No. _____

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IN THE

Supreme Court of the United States

October Term, 1992

RAUL FELICIANO, JR., *et al.*,
Petitioners,

vs.

CITY OF CLEVELAND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this civil rights action brought pursuant to 42 U.S.C. §1983, the district court held that the City of Cleveland violated the Petitioners' Fourth Amendment rights, but that the individual Respondents could not be held liable under the doctrine of qualified immunity, and that the City could not be held liable because its actions were not "official policy" under *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978), and its progeny; and that the Respondents did not violate Petitioners' substantive due process rights. The questions for review are:

1. Does the doctrine of collateral estoppel apply to a determination of "official policy" in deciding whether a city can be held liable under 42 U.S.C. §1983?

2. Whether, in light of *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989), and *Skinner v. Railway Labor Executives' Association,* 489 U.S. 602 (1989), the Court of Appeals correctly applied the material factors in determining whether there was a substantive due process violation.

PARTIES TO THE PROCEEDING

Petitioners, Raul Feliciano, Jr., Richard Rojas, Valeria Greathouse, Robert S. Beavers, Richard Zappala and Darryl T. Hood, were members of a cadet recruit class in the City of Cleveland's Police Department. Respondent City of Cleveland is a municipal corporation in the State of Ohio. Respondents, Police Chief William T. Hanton, Safety Director Reginald Turner, Sergeant Lloyd Bratz, William Bartley, Glenn Groudle, Robert James and Mitchell Brown, are/were individuals involved in the surprise urine testing program, conducted without reasonable suspicion or any communicated standards and procedures to protect Petitioners' privacy interests.

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RAUL FELICIANO, JR., *et al.*,
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vs.

CITY OF CLEVELAND, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A1) is published at 988 F.2d 649 (6th Cir. 1993). The prior opinion of the court of appeals (App., *infra*, A15), which holds that the individual Respondents are entitled to qualified immunity for the Fourth Amendment violation, is not published. The first opinion of the district court is published at 661 F. Supp. 578 (N.D. Ohio 1987) (App., *infra*, A17), but the second opinion (App., *infra*., A57) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Amendment XIV, provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . .

2. 42 U.S.C. §1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * * * *

STATEMENT OF THE CASE

This case involves the unexplained refusal of the district court and court of appeals to apply collateral estoppel to the employment policy established in *Shield Club v. City of Cleveland,* 647 F. Supp. 274 (N.D. Ohio 1986) (App., *infra,* A118), *rev'd on other grounds,* 838 F.2d 130 (6th Cir. 1987) in determining whether the City of Cleveland ("City") could be held liable under 42 U.S.C. §1983 for violation of Respondents' Fourth Amendment rights.

This case also involves the lower courts' refusal to apply the material factors delineated in *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989) and *Skinner v. Railway Labor Executives' Association,* 489 U.S. 602 (1989) in determining whether there was a substantive due process violation.

Petitioners were members of the cadet recruit class in the City's Police Department. As fully explained by the district court in its memorandum and order, the Respondents violated Petitioners' Fourth Amendment rights by the surprise urinalysis tests administered in October, 1985 (App., *infra,* A68-82). Based upon the court of appeals' ruling in *Feliciano v. City of Cleveland,* Case No. 86-3436 (6th Cir., April 10, 1987) (App., *infra,* A15), the individual Respondents were entitled to qualified immunity on the Fourth Amendment claim. This decision did "not affect in any way the right of [Petitioners] to pursue the remainder of their claims against [the Respondents] or against the City of Cleveland." (App., *infra,* A16).

On remand, the trial court granted Petitioners' motion for partial summary judgment on the Fourth Amendment claim. *Feliciano v. City of Cleveland,* 661 F.

Supp. 578 (N.D. Ohio 1987). After this Court decided *Skinner* and *Von Raab*, the trial court vacated the summary judgment ruling because "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 489 U.S. at 665-666.

The trial court determined that Petitioners' Fourth Amendment rights were violated under the *Von Raab* and *Skinner* standard, and raised, *sua sponte*, the issue as to whether Chief Hanton violated Petitioners' Fourth Amendment rights pursuant to "official policy" within the meaning of §1983. This "issue [was] not addressed by either party." (App., *infra*, A91). It "did not receive the full adversarial briefing so necessary to our system of justice." (App., *infra*, A96).

The district court found that Hanton's official actions were not "official policy." However, the court failed to address whether the doctrine of collateral estoppel applied to the determination of "official policy" which establishes whether the City can be held liable under §1983. Furthermore, the court failed to apply the material factors in determining whether there was a substantive due process violation.

The issues before the court of appeals included whether summary judgment should have been granted against Petitioners on these key issues. The court of appeals affirmed, and completely disregarded Petitioners' arguments. Because *Monell* and its progeny, and *Von Raab* and *Skinner*, dispose of the questions presented, summary reversal is warranted.

REASONS FOR GRANTING THE WRIT

I.

This Honorable Court must answer the first question for review in the affirmative. This is a classic collateral estoppel case. This case merits review by this Court on a Writ of Certiorari because it presents a substantial question regarding municipal liability under 42 U.S.C. §1983; and the failure of the lower courts to apply the doctrine of collateral estoppel represents a substantial departure from accepted and usual course of judicial proceedings, which clearly calls for this Court's supervision.

In *Monell*, 436 U.S. at 694, this Court carefully set forth the limits of liability for municipalities:

> We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.

In *Monell*, the Court held that municipalities could be found liable under §1983, but only if "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. The Court explained that this requirement prevented a municipality from being held liable under *respondeat superior* simply for employing a tortfeasor. For the purpose of §1983, the City is liable because this case is about the *official action* of Police Chief Hanton in implementing the City's "official policy."

In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), this Court, in a plurality opinion, concluded:

> *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality"—that is, acts which the municipality has officially sanctioned or ordered.
>
> With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under §1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (City Council passed resolution firing plaintiff without a pretermination hearing); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) (City council canceled license permitting concert because of dispute over content of performance). But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell's* language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," *Monell, supra*, 436 U.S., at 694, 98 S.Ct., at 2037-2038, and whose decisions therefore may give rise to municipal liability under §1983.

Id. at 480.

> We hold that municipal liability under §1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect

> to the subject matter in question. *See Tuttle, supra*, at 823, 105 S.Ct. at 2436 (" 'policy' generally implies a course of action consciously chosen from among various alternatives").

Id. at 483-484.

This Court subsequently reflected upon *Pembaur*:

> Two terms ago, in *Pembaur, supra*, we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. Although the Court was unable to settle on a general formulation, Justice BRENNAN's plurality opinion articulated several guiding principles. First, a majority of the Court agreed that municipalities may be held liable under §1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." 475 U.S., at 480, 106 S.Ct., at 1298. Second, only those municipal officials who have "final policymaking authority" may by their actions subject the government to §1983 liability. *Id.*, at 483, 106 S.Ct., at 1300. Third, whether a particular official has "final policymaking authority" is a question of *state law*. *Ibid.* Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy *in that area* of the city's business. *Id.*, at 482-483, and n.12, 106 S.Ct., at 1299-1300, and n.12. (emphasis in original).

City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988); *see also Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989).

In none of these decisions did this Court address the issue of whether collateral estoppel applies to the determination of "official policy" in §1983 actions. This Court should clearly hold that it does.

The *Shield Club* case explains that there was a policy "created by the Civil Service Commission Manual of 'Medical Standards and Requirements (Revised)' " which was revised August 21, 1978 as a result of Judge William K. Thomas's order. *Shield Club*, 647 F. Supp. at 279-281 (App., *infra*, A125-30). Judge Thomas thoroughly reviewed the Manual and explains the "*Drug Use and Abuse Not Addiction*" cause for rejection for appointment as a police officer. This provision states:

> (a) Drug abuse characterized by:
>
> (1) The evidence of use of any narcotic drug, amphetamine or hallucinogenic substance *at time of examination* when the use cannot be accounted for as the result of the advice of a recognized health care practitioner (emphasis in original).

Id. at 280 (App., *infra*, A127). The Manual provides for compulsory "urinalysis" as a part of the medical examination. The urine testing for the presence of marijuana and other controlled substances was carried out by the "Medical Department of the Police and Fire Service", and Hanton described the urine testing, in a final letter to the Petitioners, as "the final phase of your medical examination." *Id.* (App., *infra*, A128).

The medical director, Godofredo Domingo, M.D., notified Petitioners that they were medically unacceptable because they tested positive for marijuana, and that this action was "in accordance with the medical standards and requirements for the police and fire service applicants by the Civil Service Commission of the City of Cleveland." *Id.* (App., *infra*, A129).

Judge Thomas explained that the test results were a "cause for rejection" from at least August 21, 1978. He summarized:

> This medical "cause for rejection," one of the medical standards and requirements of the city, thus underpins and particularizes the *city's employment policy* which denies "final appointment of any police patrol cadet who is a user of a controlled drug substance." Chief Hanton gave one justification for this employment policy in his testimony of December 16, 1985 before the Civil Service Commission. He testified:
>
> > I advised the recruits [on October 23 at the Police Academy] that since the tests had proved positive there was no way we could put recruits on the streets with hand weapons who were using illegal substances.
>
> Based upon the *non-delegable responsibility of the city through its police department* to maintain public safety and to enforce and uphold state and federal laws and city ordinances prohibiting or criminalizing the possession, sale or distribution of controlled drug substances, and upon the entire record, it is concluded that the city is warranted in denying final appointment of any police patrol cadet who is a user of a controlled drug substance.

Id. at 281 (emphasis added) (App., *infra*, A129-30). *See also* 16A McQuillin Mun. Corp. §43.35.50 (3rd Ed. 1992).

The *Shield Club* case reaffirmed the City's established "policy" for §1983 liability in this case. The "policy" in *Shield Club* is the same presented in this case. The City was a party, and the factual issues (testing for drugs) are identical. Therefore, the determination of whether the City had a "policy" for marijuana (and other drug use) testing is entitled to collateral estoppel effect. *See Montana v. U.S.*, 440 U.S. 147 (1979). The *Shield Club* decision mandates a determination that there was an employment policy. The failure of the district court and the court of appeals to address this key issue mandates review.

II.

This case merits review by this Court on a Writ of Certiorari because the lower courts failed to apply *Von Raab's* and *Skinner's* material factors in determining whether there was a substantive due process violation. In *Von Raab,* the district court ruled that the drug tests were so unreliable that they violated substantive due process. *Von Raab,* 649 F. Supp. 380, 389-390 (E.D. La. 1986). The court of appeals reversed this ruling because the Federal Regulations provided the minimum requirements of procedures, accuracy, and reliability needed to comport with substantive due process. The court of appeals specifically required:

> proper storage, handling and measurement techniques . . . chain of custody procedures . . . [the opportunity for the individual tested to] re-submit a specimen pronounced positive to a laboratory of his own choosing for retesting [and] a quality-assurance feature.

Von Raab, 816 F.2d 170, 181-182 (5th Cir. 1987). This Court affirmed the decision.

In this case, the lower courts failed to address all of the factors necessary to conclude that the drug testing program complied with substantive due process. Instead, both courts focused solely upon the fact that there was a confirmation test performed after the Petitioners were terminated from employment. In doing so, both courts ignored the material factors delineated by this Court in *Von Raab* and in *Skinner.*[1]

[1] The lower courts also disregarded relevant case law. *Compare Wrightsell v. City of Chicago,* 678 F. Supp. 727, 730 (N.D. Ill. 1986); *Jones v. McKenzie,* 628 F. Supp. 1500, 1505-1507 (D.D.C. 1986) (termination of employee on the basis of screening test's positive result was arbitrary and capricious) *rev'd in part,* 833 F.2d 335 (D.C. Cir. 1987), *vacated sub nom., Jenkins v. Jones,* 109 S. Ct. 1633 (1989)

(Footnote continued on following page.)

In the instant case, Daniel A. Spyker, Ph.D., M.D., a board certified toxicologist, completely analyzed the documentation obtained from defendants and Smith Kline (App., *infra*, A147). He explained that a drug testing program "must deal with policies and procedures for confirmation testing when the screen is positive to protect both the employee and employer from false accusations," confirmatory testing must take place before taking any action; the policy must be well-known to the employees, and there must be a documented chain of custody.[2] He concluded that:

(Footnote continued from preceding page.)
aff'd and amended, 878 F.2d 1476 (D.C. Cir. 1989); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1521 (D.N.J. 1986) ("refusal to afford plaintiff a full opportunity to evaluate and review their personal test results or to have their own specimens re-tested by a technician of their choice offends traditional notions of fundamental fairness and [substantive] due process"); *McDonell v. Hunter*, 746 F.2d 785 (8th Cir. 1984), 612 F. Supp. 1122, 1128-9 n.4 (D.C. Iowa 1985); (policy lacking standards and procedures resulted in use of unfettered discretion); *Penny v. Kennedy*, 915 F.2d 1065, 1068 (6th Cir. 1990) (substantive drug process issue not adequately addressed in record); *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139, 1146 (3rd Cir. 1988) (no substantive due process violation in the context of this case); *Rushton v. Nebraska Public Power District*, 653 F. Supp. 1510, 1525 (D. Neb. 1987), *aff'd*, 844 F.2d 562 (8th Cir. 1988) (plan calling for confirmation of screening test by GC/MS prior to disciplinary action was accurate and did not constitute an "arbitrary and capricious deprivation of liberty"); *Everett v. Napper*, 833 F.2d 1507, 1513 (11th Cir. 1987) (termination based upon reasonable suspicion that fire-fighter had used drugs and his refusal to submit a drug sample was not a violation of substantive due process); and *Murphy v. McClendon*, 712 F. Supp. 921, 924 (N.D. Ga. 1988) (granted summary judgment on plaintiffs' substantive due process claim because drug testing without individual reasonable suspicion was an arbitrary intrusion on the officers' right to privacy). *See also*, K. Zeese, *Drug Testing Legal Manual*, §5.02[2] (1990); and M. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 Chi.-Kent L. Rev. 683, 733-734 (1987).

[2] *See* HHS Reg. §§2.4-2.7, and *The American Bar Association's Drug Testing Programs by Public Employers: Suggested Guidelines* (1988).

> . . . in the absence of carefully designed and communicated policies and procedures, the absence of a chain of custody, and the uncertainties in the testing technology employed, it is my opinion that Feliciano, *et al.* have not been found culpable. (App., *infra*, A153).

Respondents did not provide the trial court with any competent evidence disputing Dr. Spyker's finding and opinion as to the reliability of the drug testing. The random drug testing programs in *Von Raab* and *Skinner* were upheld as constitutional because they were not only reliable, but also because they provided employees with carefully designed and communicated procedures, which protect their privacy interests.

In this case, and unlike *Von Raab* and *Skinner*, the undisputed facts indicate that Petitioners volunteered and were denied the right to have independent testing performed. Moreover, Petitioners did not have an opportunity to test either of the samples. The integrity of the small amount of urine left was in question. *See Skinner*, 489 U.S. at 621 n.5; and HHS Reg. §§3.9 and 2.4(n) (one-year storage of confirmed positive); *Banks v. F.A.A.*, 687 F.2d 92 (5th Cir. 1982).

By further contrast, in *Von Raab* and *Skinner*, there was no direct observation of the act of urination, and there existed policies and procedures for the authorization, collection, and analysis of drug samples which protected employees' privacy rights. *Skinner*, 489 U.S. at 610-612; and *Von Raab*, 489 U.S. 656 at 661. In this case, there was direct observation of the samples taken from the Petitioners in the bathrooms at the Police Academy, not at the medical center, even though both are located in the same building. *See Feliciano*, 661 F. Supp. at 580-1 (App., *infra*, 63, 78). Petitioner Rojas

was unable to urinate, despite "forcing" himself, until 45 minutes had elapsed (App., *infra*, A20). Petitioner Greathouse, a female cadet, graphically described the direct observation of her urination (App., *infra*, A63, 76).

Additionally, Respondents stipulated that they did not have reasonable suspicion to test Petitioners. The district court agreed with Petitioners, "that the urinalysis conducted in this case was technically deficient," and that their rights to privacy had been violated (App., *infra*, A82). The court concluded, *inter alia*, that there was no notice given prior to the initial testing; there was direct observation of some of the recruits during urination; the City had superior officers, instead of medical personnel (who were in the same building), conduct the observations and collections; there were no written procedures governing the scope and analysis of the urine; there were no written procedures governing whether criminal prosecution could result; and the testing procedures were "widely regarded as incomplete," and generally gave unfettered discretion to those charged with administering the program (App., *infra*, A78). Despite Dr. Spyker's affidavit, and the lack of competent evidence to contradict it, the district court held that the testing procedures were not "totally arbitrary," and that they appear to have been "totally accurate." (App., *infra*, A102). These findings fly in the face of *Von Raab* and *Skinner*, as well as Dr. Spyker's affidavit and the summary judgment standard.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for a Writ of Certiorari should be granted to review the final judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 92-3015/3096

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RAUL FELICIANO, JR., and VALERIA GREATHOUSE (92-3015/3096),
Plaintiffs-Appellants,

RICHARD ROJAS; ROBERT S. BEAVERS; RICHARD ZAPPALA; and DARRYL T. HOOD (92-3096),
Plaintiffs-Appellants,

v.

CITY OF CLEVELAND, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed March 16, 1993

Before: KENNEDY and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

BAILEY BROWN, Senior Circuit Judge. Plaintiffs, a group of former cadets in the City of Cleveland's ("City") police academy, appeal from the district court's grant of summary judgment against them in this action under 42

U.S.C. § 1983 (1988). The plaintiffs contend that the City violated their Fourth and Fourteenth Amendment right to be free from unreasonable searches and seizures and that the City and several Cleveland police officers and employees violated their Fourteenth Amendment right to substantive due process when the defendants subjected the plaintiffs to a surprise drug test while they were cadets at the City's police academy. The plaintiffs tested positive for marijuana use and were forced to resign. The district court granted summary judgment for the defendants on all claims. For the reasons stated below, we **AFFIRM** the judgment of the district court.

I

In October, 1985, William Hanton, who was then the Chief of Police of Cleveland, received a tip that some unnamed cadets in the Cleveland police academy were using controlled substances, so he decided to administer a drug test to the entire class. Hanton looked for a laboratory to perform the test and decided to use SmithKline Bio-Science Laboratories in Beachwood, Ohio. On the morning of October 21, 1985, during the cadets' final week of training, the male cadets were told to go to the men's rest room and the female cadets were told to go to the women's rest room where they were given containers marked with their names and badge numbers. They were then told to urinate into the containers.

Because all of the cadets were being *required* to give their samples at the same time, some of the plaintiffs were forced to produce their samples while standing in the middle of the rest room while their superior officers watched. One plaintiff, Robert Beavers, wanted to wait and produce his sample in a stall, but a police officer told him to urinate while standing in front of the officer. When Beavers objected, the officer told him that he would be terminated unless he urinated within the officer's view immediately. J. A. at 339. During the test, the police

officers collecting the samples allegedly made remarks such as "[w]e want to see what you have been doing this weekend" and "[e]verybody pees." J. A. at 235.

The urine samples were sent to SmithKline where they were screened for commonly abused drugs, including marijuana and cocaine. The laboratory tested each sample with the enzyme immunoassay test and the thin layer chromatogram test. Samples that tested positive for the presence of marijuana were re-tested with the radioactive immunoassay test to confirm the result. The samples provided by the plaintiffs tested positive for marijuana. The laboratory re-tested the plaintiffs' samples the next day using the same tests, and the samples again tested positive.[1]

After Chief Hanton received the results of the drug test, he passed the information to Reginald Turner, the Public Safety Director, and recommended that Turner terminate the plaintiffs. J. A. at 181. On October 22, 1985, the plaintiffs met individually with a panel of three officers. The officers told them that the drug test revealed traces of marijuana in their urine. When given the opportunity to explain the presence of marijuana in their urine, some of the plaintiffs claimed that they had not smoked any marijuana themselves, but that they were exposed to marijuana smoke at parties the weekend before they were tested. Other plaintiffs admitted that they had smoked marijuana in the past but claimed that they had not smoked it recently. The panel of officers informed all of the plaintiffs that they could resign or submit a second

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[1] As part of an internal quality control measure, the samples with sufficient volume were later re-tested by SmithKline using a gas chromatography/mass spectrometry test, which is more expensive and more reliable than the other three tests, to re-confirm the positive results after the plaintiffs had been forced to resign. J. A. at 207. The specimens from the plaintiffs who chose to give a second sample were also part of this internal quality control measure.

urine sample and face probable termination by Safety Director Turner the next day.

After roll call on October 23, 1985, the plaintiffs were separated from the rest of the class. They were informed that Safety Director Turner had decided to fire them because they had violated their probationary period by smoking marijuana. However, they were told that they could resign instead of being fired. Given this choice, the plaintiffs all agreed to resign instead of waiting for termination. A police officer handed them previously prepared letters of resignation, and the plaintiffs signed them.

On November 13, 1985, two of the cadets, Richard Rojas and Raul Feliciano, filed a complaint in federal district court alleging that the City had a policy of conducting drug testing without standards or procedures. This policy, they alleged, caused violations of their rights under the Fourth, Fifth, and Fourteenth Amendments. The plaintiffs also alleged that their constitutional rights had been violated by several individual defendants. On October 17, 1986, Valeria Greathouse, Robert Beavers, Richard Zappala, and Darryl Hood, four more of the cadets who tested positive for marijuana use, filed a complaint in district court containing similar allegations. The two actions were consolidated. Named in the complaints as defendants are former Public Safety Director Turner, former Chief of Police Hanton, several police officers, several employees of the City, and the City itself.

On January 22, 1986, the individual defendants in their individual capacities filed a motion for summary judgment on the plaintiffs' claims on the ground of qualified

immunity directed to the first action.[2] While this motion was pending, the City also filed a motion for summary judgment. In a marginal order dated April 11, 1986, the district court denied the individual defendants' motion for summary judgment. Following a timely appeal, this court, in an unpublished opinion dated April 10, 1987, reversed the district court and ordered it to grant summary judgment for the individual defendants on the Fourth and Fourteenth Amendment issue on the ground of qualified immunity. J. A. at 278. The Fourth and Fourteenth Amendment and Fourteenth Amendment claims against the City remained as did the Fourteenth Amendment claims against the individual defendants in their individual capacities.

The plaintiffs then moved for summary judgment on their Fourth and Fourteenth Amendment claim against the City. In *Feliciano v. City of Cleveland*, 661 F. Supp. 578 (N.D. Ohio 1987) ("*Feliciano I*"), the district court granted the plaintiffs' motion for summary judgment against the City and, pursuant to this court's prior unpublished opinion, granted summary judgment for the individual defendants on the Fourth and Fourteenth Amendment claim on the ground of qualified immunity. The Fourteenth Amendment claims against the City and the individual defendants in their individual capacities still remained. On December 14, 1989, however, in light of two Supreme Court decisions handed down after *Feliciano I* was decided, the district court vacated *Feliciano I* in an unpublished order.

After the district court vacated *Feliciano I*, the parties moved for summary judgment on all counts. On November 26, 1991, the district court granted summary judgment for the defendants on all counts. The court held that the drug testing was an unreasonable search because

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[2]This motion for summary judgment was, without objection, treated by the district court as directed toward both complaints.

there were no regulations governing the manner in which the urinalysis was conducted. *Applying the test established by the Supreme Court in National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), it held that the manner in which the test was conducted was unduly intrusive and oppressive.* However, it concluded that the City was not liable for damages under the Fourth and Fourteenth Amendments because a final policymaker for the City had not instituted the drug test, and therefore, the City itself had not committed the constitutional tort. The court again, consistent with the unpublished opinion of this court, granted summary judgment for the individual defendants on the Fourth and Fourteenth Amendment claim on the ground of qualified immunity. Turning to the plaintiffs' Fourteenth Amendment claims, the court concluded that the plaintiffs had not been denied their rights to equal protection or procedural or substantive due process. The district court accordingly granted summary judgment for the defendants as to these claims. The plaintiffs then perfected this timely appeal to this court contending only that the district court erred in finding that the City was not liable on the Fourth and Fourteenth Amendment claim and that neither the City nor the individual defendants were liable under the substantive due process component of the Fourteenth Amendment.

II

This court reviews the grant of summary judgment *de novo*. *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990). "Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* If a reasonable jury could not find that the nonmoving party is entitled to a verdict then there is no genuine issue for trial and summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III

A

We turn first to the question of the City's liability.[3] The plaintiffs contend that the district court erred when it found that the City is not liable for damages. They argue that the Chief of Police has the authority to make final policy for the City on drug testing of police; therefore, they contend, the City is liable for his decision to drug test the plaintiffs without proper regulations. Alternatively, the plaintiffs contend that even if Chief Hanton did not have the authority to make final policy regarding drug testing, a final policymaker for the City ratified Chief Hanton's decision.

In several decisions, the Supreme Court has begun to define the contours of municipal liability under § 1983. In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690 (1978), the Court held that municipalities and other local government units are "included among those persons to whom § 1983 applies." Local governments may therefore be properly sued for "monetary, declaratory, or injunctive relief" when they commit a constitutional tort. *Id.*

However, a local government is liable as an entity only when the government itself has committed the constitutional violation, not when the violation was committed by its employees. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79 (1985). As the *Monell* Court stated:

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[3]The only question that we address with respect to the Fourth and Fourteenth Amendment issue is whether the City is responsible under § 1983 for the alleged Fourth and Fourteenth Amendment violation. Since we determine that the City is not responsible for the conduct of Chief Hanton and his subordinates and that Safety Director Turner did not authorize or ratify such conduct, we need not address the question of whether any of these individuals committed such a violation.

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell, 436 U.S. at 694. The principle of *respondeat superior*, therefore, is inapplicable to § 1983 actions because § 1983 extends liability only to persons who "cause" constitutional violations, and municipalities do not "cause" constitutional violations solely by having employed a constitutional tortfeasor. *Id.* at 691-92.

In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1985), the Supreme Court held that a municipality can be held liable under § 1983 for a single decision by the municipality's policymakers. *Id.* at 479-80. However, the municipality is liable for an official's unconstitutional action only when the official is the one who has the "final authority to establish municipal policy with respect to the action ordered." *Id.* at 481 (plurality opinion). Mere authority to exercise discretion while performing particular functions does not make a municipal employee a final policymaker unless the official's decisions are final and unreviewable and are not constrained by the official policies of superior officials. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion). Officials can derive their authority to make final policy from customs or legislative enactments, or such authority can be delegated to them by other officials who have final policymaking authority. *Pembaur*, 475 U.S. at 483 (plurality opinion).

To determine whether final authority to make municipal policy is vested in a particular official, we must resort to state law. *Praprotnik*, 485 U.S. at 125 (plurality opinion); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989); *Mandel v. Doe*, 888 F.2d 783, 793 (11th Cir. 1989). This includes "state and local positive law," such as statutes, ordinances, and regulations, and

less formal sources of law such as local practice and custom. *Jett*, 491 U.S. at 737; *Mandel*, 888 F.2d at 793.

Turning now to the case at bar, it is undisputed that the Chief of Police ordered the drug test of the plaintiffs. Therefore, the City *can* be liable if: 1) Chief Hanton had the authority under applicable state law to make final policy regarding drug testing of police; or 2) a final policymaker for the City ratified Chief Hanton's actions. We shall first determine whether state law vested Chief Hanton with final policymaking authority, then we shall turn to the ratification question.

B

The applicable Ohio law, that is, the City Charter of Cleveland[4] and section 135.09(a) of the Cleveland Code,[5] reveals that the Chief of Police is subordinate to the Director of Public Safety. Cleveland, Ohio, Code § 135.09(a) (1988). The plaintiffs offer no regulations or written procedures that indicate otherwise. Thus, plaintiffs have not shown that the Chief of Police has been delegated the authority to make final policy regarding drug testing through Ohio positive law.

This does not end our inquiry, for we must also look at Ohio procedure and custom. *Jett*, 491 U.S. at 737. For

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[4]The Cleveland Charter provides:

> The Chief of Police shall have exclusive control of the stationing and transfer of patrolmen and other officers and employees constituting the Police Force, under such rules and regulations as may be established by the Mayor or by the director of the department to whom the Chief of Police may be immediately responsible.

Cleveland, Ohio Charter § 116 (1951).

[5]Section 135.09(a) provides in relevant part: "There is established a Division of Police in the Department of Public Safety, to be administered and controlled by a Chief of Police, subject to the provisions of the Charter and ordinances of the City, and to the direction of the Director of Public Safety." Cleveland, Ohio Code § 135.09(a) (1988).

purposes of § 1983, a "custom" is a legal institution that is permanent and established, but is not authorized by written law. *Monell*, 436 U.S. at 691. Before a custom can be the basis for a civil rights violation, the custom must be "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.*

To support their contention that it was the custom in Cleveland for chiefs of police to make final policy regarding drug testing, the plaintiffs offer several "General Police Orders" that deal with drug testing and substance abuse issued by Chief Hanton, his successors and his predecessors. One of these General Police Orders, which was issued by Chief of Police Howard Rudolph, Hanton's successor, on July 14, 1986, established a detailed written policy concerning drug testing.

Although the plaintiffs have shown that Cleveland chiefs of police have issued policy statements on drug use and drug testing, the plaintiffs have not produced evidence to show that there exists a custom with the force of law that makes the chief of police the final policymaking official with respect to the drug testing of police. The evidence that they have produced merely indicates at best that the Chief of Police has the discretionary authority to produce policy statements. Discretion to act is not to be confused with policymaking authority; no municipal liability results where an official merely has discretion to act because subjecting a municipality to liability in such a situation would be "indistinguishable" from *respondeat superior* liability. *Praprotnik*, 485 U.S. at 126 (plurality opinion). There is no showing that the Director does not retain the power to review policy statements issued by the Chief of Police regarding drug testing. Consequently, we conclude that Chief Hanton did not possess the authority to make final policy regarding drug testing of police officers.

C

The plaintiffs next contend that a final policymaker ratified Chief Hanton's actions. The plaintiffs correctly note that "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final" policy. *Praprotnik*, 485 U.S. at 127 (plurality opinion). However, mere acquiescence in a single discretionary decision by a subordinate is not sufficient to show ratification. *Id.* Otherwise, the City would be liable for all of the discretionary decisions of its employees, and this would be indistinguishable from *respondeat superior* liability.

In the case at bar, Chief Hanton testified that he informed Turner, the Director of Public Safety, of his intention to drug test the cadets before the test was given. The evidence also shows that Turner fired the police recruits based upon the results of the drug test. However, the plaintiffs have shown no evidence that Turner expressly approved Hanton's decision or that he knew the manner in which the drug test was conducted. Although Turner may have acquiesced in the drug test, this is not enough to survive summary judgment. Ratification of a subordinate's action requires more than acquiescence--it requires affirmative approval of a particular decision made by a subordinate. *See Praprotnik*, 485 U.S. at 130 (plurality opinion). Therefore, the plaintiffs must offer proof that an official charged with making final policy regarding drug testing of police expressly approved Chief Hanton's actions.[6] *Id.* At best, the evidence offered by the plaintiffs indicates that Turner acquiesced in Hanton's decisions regarding drug testing, but there is no showing that Turner or any other official expressly ratified the decision.

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[6]However, even if it were shown that the municipality subsequently ratified the decision, the plaintiffs would then have to prove that the ratification was a "moving force" in causing the

IV

The plaintiffs next contend that the City and the individual defendants in their individual capacities violated their substantive due process rights because the drug testing procedures used were unreliable and because the City did not establish a testing procedure before it administered the test.[7] They also contend that they should have been given the opportunity to take polygraph and blood tests before they were fired, and that they should have been permitted to re-test their own urine samples. Since we determined above that the City is not liable, we need only address this claim as it affects the individual defendants.

The defendants respond that the drug testing did not violate substantive due process because the tests used by SmithKline, the testing laboratory--enzyme immunoassay ("EMIT"), thin layer chromatography ("TLC"), and radioactive immunoassay ("RIA") tests--were highly reliable and were confirmed by another more accurate test after the cadets were fired. Therefore, they contend, the testing procedures were not arbitrary.

To support their contentions, the plaintiffs offered the testimony of Karen Rash, the technical head of SmithKline's Beachwood, Ohio laboratory. She testified that the urine samples collected on October 21 were tested with the EMIT test and the TLC test. The samples that tested positive using the EMIT and TLC tests were re-tested using the RIA test to confirm the results of the first two tests. Rash testified, however, that a RIA test was not the best available method to confirm positive results from an EMIT or TLC test. She testified that a gas chromatography/mass spectrometry test ("GC/MS") would be the best method of confirmation but that the

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constitutional violation. *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991).

[7]The substantive due process claim against the individual defendants is the only claim asserted against them on appeal.

GC/MS test was not used to confirm the results of the plaintiffs' test before the results were reported to the Cleveland Police Department.

Also in support of their argument, the plaintiffs offer the affidavit of Dr. Daniel A. Spyker, a board-certified toxicologist who claims to be an expert in drug testing. Dr. Spyker reviewed the testing procedures that SmithKline used, the depositions of the plaintiffs, and the deposition of Karen Rash. Dr. Spyker claimed that the EMIT, TLC, and RIA tests should be used only for the purposes of screening urine samples for positive results.[8] Any positive results obtained from these tests, Dr. Spyker contends, should be confirmed by a more accurate test before disciplinary action is taken.

The testimony of Karen Rash and the affidavit of Dr. Spyker indicate that the testing procedure used by SmithKline was not the most accurate available. However, before the plaintiffs can succeed on their due process claim, they must show that the drug test does not bear a reasonable relation to a legitimate government interest, *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977), that the testing procedures were so unreliable that they were irrational or led to irrational results, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), or that the procedures used to collect the urine "shock the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1951). Although Dr. Spyker's affidavit and Rash's deposition indicate that the EMIT, TLC, and RIA tests are not as accurate as other available tests, the plaintiffs have not shown that the use of these tests led to capricious or arbitrary results. Moreover, SmithKline ran a GC/MS test after the plaintiffs had been discharged, which confirmed the presence of marijuana in the plaintiffs'

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[8]According to Dr. Spyker, the RIA, EMIT, and TLC tests are cheaper and faster to run and should only be used to identify the few positive samples from a large group of samples. J. A. at 253-54. Once a positive result is obtained using the EMIT, TLC, or RIA test, the sample should be re-tested with a more accurate test such as the GC/MS test to confirm the result. J. A. at 254-55.

urine. Thus, the plaintiffs were terminated based upon tests that were accurate.

Further, although the procedures used to collect the urine should not be condoned, they do not shock the conscience or offend notions of liberty that are "implicit in the concept of ordered liberty." *Rochin*, 342 U.S. at 169.

We also believe that the drug tests bear a reasonable relation to the legitimate government interest of preventing police officers, who are charged with the job of drug interdiction, from abusing illegal drugs. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668-69 (1989). Accordingly, we reject the plaintiffs' substantive due process claim against the individual defendants.

V

We **AFFIRM** the judgment of the district court.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed April 10, 1987)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
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No. 86-3436

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAUL FELICIANO, JR., RICHARD ROJAS,
Plaintiffs-Appellees,

v.

CITY OF CLEVELAND, *et al.*,
Defendants,

WILLIAM T. HANTON, SGT. LLOYD BRATZ, SGT. WILLIAM BARTLEY, LT. GLEN GROUDEL, SGT. RONALD JAMES, REGINALD M. TURNER,
Defendants-Appellants.

Before: ENGEL, KRUPANSKY and GUY, *Circuit Judges.*

PER CURIAM. Individual defendants, various city officials and police officers of the City of Cleveland, appeal the denial of their motion to dismiss so much of

an action brought by the plaintiffs pursuant to 42 U.S.C. §1983 as charged them with personal liability and damages for their role in requiring the taking and testing of urine samples from police trainees in connection with eligibility for City employment. The samples were allegedly sought to determine whether the plaintiffs and other trainees had ingested unlawful drugs and hence for that reason might be disqualified from continuing their training.

Individual defendants moved for dismissal, or alternatively for summary judgment, on the ground that they are entitled to qualified immunity because they could not reasonably have concluded that their conduct would violate the trainees' constitutional rights. The major issue underlying the availability of a qualified immunity defense was authority in this circuit or other authority to which defendants have been amenable, which would clearly have apprised them that their conduct infringed Fourth Amendment rights. Therefore, under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and cases cited therein, defendants were immune from personally responding in damages.

As *Mitchell v. Forsyth* makes clear, our determination does not affect in any way the right of the plaintiffs to pursue the remainder of their claims against these defendants or against the City of Cleveland. We only hold that the trial judge was obliged to determine upon the motion made by the defendants that they were immune from personal liability in damages for any claim of violation of Fourth Amendment rights arising from the mandated urine testing.

REVERSED and REMANDED for further proceedings consistent with this opinion.

ISSUED AS MANDATE: July 17, 1987
COSTS: None

OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

(Dated June 12, 1987)

C85-3356

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RAUL FELICIANO, JR., *et al.*,
Plaintiffs,

v.

CITY OF CLEVELAND, *et al.*,
Defendants.

MEMORANDUM AND ORDER

ANN ALDRICH, *District Judge.*

Plaintiffs Raul Feliciano, Jr. and Richard Rojas filed this action on November 13, 1985, after resigning from the cadet class of the City of Cleveland Police Department. Their lawsuit challenges the constitutionality of the drug testing by urinalysis administered during their last week of peace officer training, which they maintain violated their rights under the fourth, fifth and fourteenth amendments to the United States Constitution. Named as defendants are former Safety Director Reginald M. Turner and former Chief of Police William T. Hanton, along with subordinates who allegedly performed the drug testing

under their supervision or control, Sergeant Lloyd Bratz, Sergeant William Bartley, Lieutenant Glen Groudel, and Sergeant Ronald James (together, "the individual defendants"), and the City of Cleveland ("the City").

On April 28, 1986, the City of Cleveland filed a motion for summary judgment on the merits of this action. It was superceded by defendants' supplemental motion for summary judgment, which was filed on August 13, 1986 and joined by the individual defendants. Plaintiffs' deadline for responding to the supplemental summary judgment motion was extended while they sought the requisite discovery. By its Order of November 12, 1986, this Court approved the parties' agreement to postpone further discovery (and by logical extension plaintiffs' response to defendants' summary judgment motion on claims other than the fourth amendment) until this Court could rule upon plaintiffs' motion for partial summary judgment on their fourth amendment claims. Plaintiffs' motion for partial summary judgment was filed on December 12, 1986. These cross-motions for summary judgment on plaintiffs' fourth amendment claims are now before this Court, as well as the individual defendants' supplemental motion for dismissal or summary judgment, filed April 16, 1987.

For the reasons set forth below, plaintiffs' motion for partial summary judgment is granted against the City, and defendants' motion for summary judgment on the fourth amendment claims is denied. The individual defendants' supplemental motion for dismissal on the basis of qualified immunity is granted with respect to fourth amendment claims and deferred with respect to plaintiffs' other claims.

Jurisdiction is present pursuant to 28 U.S.C. §1343(3) (1982) and 28 U.S.C. §§2201 and 2202 (1982).

I. FACTS

The facts of relevance to the motions before this Court are not in dispute. During the week of October 7, 1985, then Chief of Police Hanton received a tip that current members of the police academy were known to use narcotics. Deposition of William T. Hanton ("Hanton dep."), at 4-5. Because no names of implicated cadets were mentioned, Hanton decided that the entire class should be tested for drug abuse. Hanton testimony before Civil Service Commission ("Hanton CSC"), at 36-37. A testing plan was developed by Hanton and the medical bureau, Hanton Dep., at 8-9, and Hanton decided to conduct the first surprise drug test of police cadets in Cleveland. Hanton CSC, at 38. When Hanton made his decision with respect to testing, he had no reasonable suspicion of drug use directed at any particular member of the class, including Feliciano and Rojas. *Id.* at 37; Answer, ¶7.

During the morning of Monday, October 21, 1985, all cadets were required to produce urine samples. Answer, ¶7. At that time, plaintiffs were beginning their final week of training, and they had already satisfactorily passed a physical examination. Answer, ¶6. The cadets were directed to go to a restroom row-by-row from their classroom. Sgt. Bratz informed them that they were undergoing additional medical screening. Deposition of Raul Feliciano, Jr. ("Feliciano dep."), at 18-20. However, the persons administering the test wore guns, which was unusual at the academy. Feliciano affidavit of November 12, 1986, at ¶3; Rojas affidavit of November 12, 1986, at ¶5. The cadets were provided containers labeled with their names and badge numbers and instructed to produce a urine sample. *Id.* at 21-22; deposition of Richard Rojas ("Rojas dep."), at 16. Feliciano produced a

sample in a toilet stall. Feliciano dep., at 25. Because all stalls were occupied when Rojas reached the restroom, he was forced to produce his sample in the open at a urinal, where he was watched by Sgt. Bratz and another person. Rojas dep., at 16. He was unable to urinate despite "forcing" himself until forty-five minutes had elapsed. *Id.* at 17.

When a sample was obtained, it was returned to a box with other samples. Feliciano dep., at 25; Rojas dep., at 17. The cadets gathered in a lounge until everyone had produced a sample. Rojas dep., at 18. Sgt. Bratz entered the lounge and indicated that he did not know what was happening with respect to the sample collection. When everyone had finished, the cadets returned to the classroom. *Id.*

The cadets' urine samples were sent to Smith Kline Miles Laboratory in Beachwood, Ohio, where they were screened for the most commonly abused drugs, including marijuana and cocaine. Karin Rash testimony before Civil Service Commission ("Rash CSC"), at 7. The samples provided by Rojas and Feliciano tested positive for marijuana. Rash CSC, at 12. Their samples were retested the next day, with the same results. Rash, CSC, at 13.

On October 22, 1985, Feliciano and Rojas were separately interviewed by a panel of three officers. Feliciano dep., at 26; Rojas dep., at 19. Each was told that traces of marijuana had been found in his urine. Feliciano testimony before Civil Service Commission ("Feliciano CSC"), at 31-32; Rojas testimony before Civil Service Commission ("Rojas CSC"), at 6. Both plaintiffs maintained that they had been present at parties the prior weekend at which marijuana had been smoked, but that they had not smoked it themselves. Feliciano dep.,

at 28; Rojas dep., at 21. The panel informed Feliciano and Rojas that they had the options of resigning or facing termination by Safety Director Turner the next day. Feliciano CSC, at 34; Rojas CSC, at 6, 14-15.

After roll-call on October 23, 1985, several cadets were separated from those in the classroom. At about 2:30 p.m., Chief of Police Hanton, accompanied by other officers, told these cadets that at 4:00 p.m. they would be terminated for violating their probation period. Rojas CSC, at 7-8; Hanton CSC, at 3-7. After Hanton and the other officers left, Sgt. James brought letters of resignation, which he indicated could be submitted by the cadets to be terminated. Rojas CSC, at 8; Feliciano CSC, at 29. Feliciano and Rojas signed these resignation letters. Rojas CSC, at 9; Feliciano CSC, at 29. Afer a hearing, the Civil Service Commission determined that Feliciano and Rojas' resignations were voluntary and not coerced.

II. STANDARDS FOR SUMMARY JUDGMENT

Fed.R.Civ.P. 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

The nature of materials properly presented in a summary judgment pleading is set forth in Fed.R.Civ.P. 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall

> show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett,* _____ U.S. _____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In reviewing summary judgment motions, this Court must view the evidence in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Hasan v. CleveTrust Realty Investors, Inc.,* 729 F.2d 372 (6th Cir.1984). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.,* _____ U.S. _____, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil trials the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* 106 S.Ct. at 2512. Although "[t]he mere existence of a scintilla of

evidence in support of the [non-movant's] position will be insufficient" to defeat a summary judgment motion, the Court is not precluded from denying a summary judgment motion where it concludes that proceeding to trial is a better course. *Id.* at 2512, 2514.

III. QUALIFIED IMMUNITY OF THE INDIVIDUAL DEFENDANTS

On January 22, 1986, the individual defendants moved for dismissal or summary judgment on the ground of qualified immunity. That motion was denied by this Court on April 11, 1986, and an interlocutory appeal was taken. A year later, the Sixth Circuit reversed this Court's decision. After making clear that the defendants' qualified immunity appeal implicated only plaintiffs' fourth amendment claims, the court concluded:

> [O]ur determination does not affect in any way the right of the plaintiffs to pursue the remainder of their claims against these defendants or against the City of Cleveland. We only hold that the trial judge was obliged to determine upon the motion made by the defendants that they were immune from personal liability in damages for any claim of violation of fourth amendment rights arising from the mandated urine testing.

Feliciano v. City of Cleveland, No. 86-3436, slip op. at 3 (6th Cir. April 10, 1987) [816 F.2d 679 (table)]. Thus, to the extent that defendants' supplemental motion for dismissal or summary judgment, filed on April 16, 1987, requests that this Court dismiss the fourth amendment claims against the individual defendants as mandated by the Sixth Circuit, that motion is granted.

The supplemental motion also requests that judgment be entered for the individual defendants on the remaining claims of plaintiffs' complaint, or that these claims against them be dismissed. Plaintiffs have objected to the motion on procedural grounds. This Court is unpersuaded by plaintiffs' procedural arguments. Judgment is reserved on the motion, however, until plaintiffs respond on the merits. Plaintiffs' response shall be filed within ten (10) days.

IV. FOURTH AMENDMENT ANALYSIS

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It is applied to the states and their subdivisions through the fourteenth amendment, *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), and it restricts the activities of civilian authorities, as well as law enforcement officers. *New Jersey v. T.L.O.,* 469 U.S. 325, 335-37, 105 S.Ct. 733, 740-41, 83 L.Ed.2d 720 (1985). Thus, the conduct of governmental employers is governed by the fourth amendment. *O'Connor v. Ortega,* _____ U.S. _____, 107 S.Ct. 1492, 1497, 94 L.Ed.2d 714 (1987) (plurality opinion).

The fourth amendment does not restrict all searches and seizures by government, but it does prohibit all *unreasonable* searches and seizures. Accordingly, analysis of an alleged fourth amendment violation

proceeds in two steps. First, the Court must determine whether the government's conduct constitutes a search or seizure by infringing a legitimate expectation of privacy. If a search or seizure is indicated, the Court must then determine whether the search or seizure was reasonable. *See O'Connor,* 107 S.Ct. at 1495. However, even a search or seizure which would be prohibited if effected against the will of the person whose privacy expectation was invaded is valid if it was authorized by consent. *Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973) (citing *Katz v. United States,* 389 U.S. 347, 358, 88 S.Ct. 507, 515, 19 L.Ed.2d 576 (1967), and *Vale v. Louisiana,* 399 U.S. 30, 35, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409 (1970)).

While many judicial decisions regarding the constitutionality of drug testing by governmental actors have been rendered during the past year and a half, this Court believes that the framework for its analysis is dictated by an opinion arising in a slightly different context. In *O'Connor v. Ortega,* 107 S.Ct. at 1492, the Supreme Court recently made its first attempt to delineate the fourth amendment rights of public employees. The case arose from the warrantless search of the office, desk and filing cabinets of a physician employed in a state hospital. While the interests implicated by such a search are obviously different from those involved in a urinalysis to test for drug use, the principles adopted by the Supreme Court in its analysis are controlling on this Court. Indeed, the *O'Connor* plurality broadly identified the second issue it faced as "the appropriate Fourth Amendment standard for a search conducted by a public employer in areas in which a public employee is found to have a reasonable expectation of privacy." 107 S.Ct. at 1495. The parameters of this issue as framed by the Supreme Court

clearly encompass the inquiry this Court must make if it determines that urinalysis for drug testing is a search or seizure. This Court turns to the preliminary issue, then, beginning with the guidance offered by *O'Connor*.[1]

A. *Compelled Urinalysis is a Search*

O'Connor's precedential value is unfortunately diminished by the Supreme Court's inability to muster an opinion of the Court. There appears to be no disagreement that the fourth amendment will apply to a public employer's conduct which infringes "an expectation of privacy that society is prepared to consider reasonable." *O'Connor,* 107 S.Ct. at 1497 (quoting *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 30 L.Ed.2d 85 (1984)). The plurality indicates that a public employee's expectation of privacy "must be assessed in the context of the employment relationship," requiring a case-by-case analysis. *O'Connor,* 107 S.Ct. at 1498. However, Justice Scalia, whose concurrrence was necessary to reverse and remand the case, clearly disagrees with the plurality's analysis on this issue. He rejects the case-by-case standard as "devoid of content" and indicates that the question of "whether Fourth Amendment protections apply . . . must be answered on a more 'global' basis." Justice Scalia

[1] In *Guiney v. Roache,* 654 F.Supp. 1287 (D.Mass.1987), a federal district court held that the abstention doctrine of *Railroad Commission of Texas v. Pullman,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) required that it refuse to consider a fourth amendment challenge to a drug testing program, since the Massachusetts Constitution offers broader protection against searches and seizures. Section 14, Article 1 of the Ohio Constitution, which prohibits unreasonable searches and seizures, is identical in scope with the fourth amendment. *Houck v. State,* 106 Ohio St. 195, 199, 140 N.E. 112 (1922). Thus, *Pullman* abstention is not indicated in this case. *See Rushton v. Nebraska Public Power District,* 653 F.Supp. 1510, 1529 (D.Neb.1987).

concludes that he would generally hold that government employees are entitled to fourth amendment safeguards, and would consider factors unique to each workplace situation when determining whether a search was "reasonable." *Id.* at 1505. In contrast, the opinion of the four dissenting justices appears to agree with the plurality that " 'operational realities' of the workplace" must be evaluated when determining whether public employer conduct is restricted by the fourth amendment, but it disagrees with the plurality with respect to how such an evaluation should be performed. *Id.* at 1508.

Whatever the formulation of the analysis of legitimate expectation of privacy, this Court believes that the Supreme Court would join with Justice Scalia's inclination to find that drug testing of public employees inevitably triggers fourth amendment protection. Unlike *O'Connor,* which raised the spectre of daily constitutional decisions by ordinary government employees involved in ordinary office interactions, a constitutional challenge to drug testing by urinalysis involves activity which is extraordinary in the context of virtually any employment relationship. "Operational realities" need not be analyzed in each case of urinalysis, since the conclusion that there is an expectation of privacy is inevitable.

The federal and state courts which have ruled upon the constitutionality of drug testing by urinalysis have been almost unanimous in their conclusion that the procedure is a search and/or a seizure within the meaning of the fourth amendment. The reasons for this conclusion, however, have varied from case to case. Many courts have decided that this result is dictated by *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), where the Court held that a withdrawal of a blood sample from a suspect, over the

suspect's objections, constituted a search within the fourth amendment. *E.g. McDonell v. Hunter,* 809 F.2d 1302, 1307 (8th Cir.1987); *Lovvorn v. City of Chattanooga,* 647 F.Supp. 875, 879 (E.D.Tenn.1986), *appeal docketed,* No. 86-6281 (6th Cir. Dec. 16, 1986); *Allen v. City of Marietta,* 601 F.Supp. 482, 488 (N.D.Ga.1985); *Storms v. Coughlin,* 600 F.Supp. 1214, 1218 (S.D.N.Y.1984); *Macias v. State,* 649 S.W.2d 150, 152 (Tex.App.1983).

Other courts have more explicitly set forth their rationales for finding that urinalysis for drug testing by public entities implicates the fourth amendment. Several have pointed to the disclosure of personal "physiological secrets" as the basis of their holding. *National Treasury Employees Union v. Von Raab,* 816 F.2d 170 (5th Cir.1987), *application for stay denied mem.,* _____ U.S. _____, 107 S.Ct. 2479, 96 L.Ed.2d 372 (1987); *McDonell,* 809 F.2d at 1307; *Capua v. City of Plainfield,* 643 F.Supp. 1507, 1513 (D.N.J.1986); *Bostic v. McClendon,* 650 F.Supp. 245, 249 (N.D.Ga.1986); *Caruso v. Ward,* 133 Misc.2d 544, 547, 506 N.Y.S.2d 789, 792 (N.Y.Sup.Ct.1986). A few courts have specifically objected to public employees monitoring their employees' off-duty conduct by urinalysis. *American Federation of Government Employees v. Weinberger ("AFGE"),* 651 F.Supp. 726, 732 (S.D.Ga.1986); *Capua,* 643 F.Supp. at 1514. The privacy usually associated with the act of urination has also been persuasive. *E.g. Von Raab,* 816 F.2d at 175.

Based upon the weight of the precedent holding that urinalysis is a fourth amendment search or seizure, numerous courts have simply adopted that holding without independent analysis. *National Federal of Federal Employees v. Weinberger ("NFFE"),* 818 F.2d

935 (D.C.Cir.1987); *Spence v. Farrier*, 807 F.2d 753, 755 (8th Cir.1986); *Railway Labor Executives' Ass'n v. Long Island Railroad Co.*, 651 F.Supp. 1284 (E.D.N.Y.1987); *Pella v. Adams*, 638 F.Supp. 94, 98 (D.Nev.1986); *Jones v. McKenzie*, 628 F.Supp. 1500, 1508 (D.D.C.1986); *Patchogue-Medford Congress of Teachers v. Board of Education*, 119 A.D.2d 35, 38, 505 N.Y.S.2d 888, 890 (N.Y.App.Div.1986), *aff'd*, _____ N.Y.2d _____, _____ N.Y.S.2d _____, _____ N.E.2d _____ (N.Y. June 9, 1987). In still other cases, either the defendants did not dispute the applicability of the fourth amendment, or the court assumed that fourth amendment analysis was appropriate without discussion. *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3d Cir.), *cert. denied*, _____ U.S. _____, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986); *United States v. Williams*, 787 F.2d 1182, 1185 (7th Cir.1986); *Tucker v. Dickey*, 613 F.Supp. 1124 (D.C.Wisc.1985); *Anable v. Ford*, 653 F.Supp. 22 (W.D.Ark.1985); *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C.App.1985); *City of Palm Bay v. Bauman*, 475 So.2d 1322 (Fla.App.1985); *Fraternal Order of Police v. City of Newark*, 216 N.J.Super. 461, 524 A.2d 430 (N.J.Super.Ct.App.Div.1987); *King v. McMickens*, 120 A.D.2d 351, 501 N.Y.S.2d 679 (N.Y.App.Div.1986), *aff'd sub nom. Perez v. Ward*, 69 N.Y.2d 840, 514 N.Y.S.2d 703, 507 N.E.2d 296 (1987); *Hampson v. Satran*, 319 N.W.2d 796 (N.D.1982). *But see Everett v. Napper*, 632 F.Supp. 1481, 1484 (N.D.Ga.1986) (no search where plaintiff refused to submit to urinalysis demand); *Turner*, 500 A.2d at 1011 (Nebeker, concurring) (because there is no expectation of privacy in urine after it is discharged, there is no seizure within the fourth amendment).

Despite the large number of decisions holding that drug testing is a search or a seizure under the fourth amendment (many of which have been rendered since the

filing of the defendants' most recent brief on the merits), the City contests this issue. Its primary argument is that urinalysis is not comparable to the blood test found to be a "search" in *Schmerber*, because there is no penetration of the body. Instead, the City submits, urinalysis is analogous to the compelled submission of hair samples, fingerprints and voice exemplars, which are "*de minimus*" intrusions. The City's argument is based upon a misconception of *Schmerber* in specific, and of the privacy interests protected by the fourth amendment in general.

While the Supreme Court did speak disapprovingly of "intrusions beyond the body's surface" when discussing the justification for the blood test in *Schmerber*, the extent of the intrusion was not relevant to whether the blood test was a "search" within the meaning of the fourth amendment. The Court stated that the fourth amendment's "overriding function" is "to protect personal property and dignity against unwarranted intrusion by the State," thus substantially overlapping with the values implicit in the fifth amendment. 384 U.S. at 767, 86 S.Ct. at 1834. Emphasizing that the fourth amendment protects against unreasonable searches of "persons," the Court indicated that it was obvious that fourth amendment constraints applied to the blood test—a proposition not disputed by the respondent in that case. *Id.*

Although the *Schmerber* court was writing on a clean slate with respect to intrusions involving the human body, *id.* at 767-68, 86 S.Ct. at 1834, it was soon called upon to develop the concept of fourth amendment "searches of the person." As noted by the City, the Supreme Court held that the fourth amendment was not implicated merely by obtaining fingerprints. *Davis v. Mississippi*, 394 U.S. 721, 727, 89 S.Ct. 1394, 1397, 22

L.Ed.2d 676 (1969), a voice exemplar, *United States v. Dionisio*, 410 U.S. 1, 9, 93 S.Ct. 764, 769, 35 L.Ed.2d 67 (1973), or a handwriting exemplar, *United States v. Mara*, 410 U.S. 19, 21-22, 93 S.Ct. 774, 775-776, 35 L.Ed.2d 99 (1973). These decisions relied upon the fact that the "intrusions" involved "physical characteristics" that are "constantly exposed to the public," *Mara*, 410 U.S. at 21, 93 S.Ct. at 776, but "none of the probing into an individual's private life and thoughts that mark an interrogation or search." *Davis*, 394 U.S. at 727, 89 S.Ct. at 1398. This critical distinction was emphasized in *Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973), where the police took scrapings from a suspect's fingernails over his protestations. Distinguishing the aforementioned cases as involving publicly exposed physical characteristics, the Court held that the suspect had been subjected to a search which "constituted the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny." *Id.* at 295, 93 S.Ct. at 2003 (quoting *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 1882, 20 L.Ed.2d 889 (1968)).

Cupp makes clear that penetration of the skin was not the key to *Schmerber*'s holding that the fourth amendment prescribed limitations on such searches of the person, and that a characterization of an intrusion as "major" or "minor" is not critical to deciding whether a "legitimate expectation of privacy" exists. Instead, *Schmerber* rests upon the well-established proposition that that which is exposed to public perception is not protected by the fourth amendment, while that which requires action to expose legitimately concealed contents is so protected. *Cf. United States v. Dunn*, _____ U.S. _____, 107 S.Ct. 1134, 1141, 94 L.Ed.2d 326 (1987)

(discussion of the "open field" doctrine); *Arizona v. Hicks*, _____ U.S. _____, 107 S.Ct. 1149, 1152, 94 L.Ed.2d 347 (1987) (confirming the crucial difference between looking at a stereo in plain view and moving it even a few inches to expose its serial number).

This Court agrees with those courts which have held that the inquiry into the physiological secrets contained in urine is a search within the meaning of the fourth amendment, despite the fact that urine is routinely discharged and that urinalysis does not require penetration of the skin. This search involves "probing into an individual's private life" as surely as if an employer would enter an employee's home to inspect for drugs or other contraband or to obtain more information about that employee. Urinalysis reveals much information in addition to whether a person has recently ingested, or been exposed to, illicit drugs; it also discloses whether a person is under treatment for a disease, suffers from a disease such as diabetes, or is pregnant. *Von Raab*, 816 F.2d at 175-76. But even if urinalysis were restricted to seeking information about illicit drug use, it would still invade personal privacy. The fourth amendment requires that such invasions of privacy be carefully controlled, even though the government's end in an investigation is justified. In addition, this Court agrees that the act of urination is uniquely private, so that the supervised collection of a sample also implicates the fourth amendment. *Cf. Kent v. Johnson*, _____ F.2d _____, _____-_____, No. 84-1578, slip op. at 10-13 (6th Cir. May 18, 1987) (reversing dismissal of claim that state prisoner allegedly forced to unnecessarily expose his body to female guards suffered a fourth amendment violation). It joins the courts which have distinguished the cases involving routinely exposed

physical characteristics while holding that drug testing implicates the fourth amendment. *Von Raab*, 816 F.2d at 176; *AFGE*, 651 F.Supp. at 733.

The City also argues that "Plaintiffs' contention [that drug testing by urinalysis is a search within the fourth amendment] would lead to the absurd result that a public employer would require some ground to suspect that a prospective employee was unfit before it could require him to subject himself to a physical examination." Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("the City's opposition brief"), at 8. It continues, "One searches in vain for any fourth amendment or other jurisprudential basis for distinguishing between furnishing urine samples as part of such physical examinations and furnishing them in connection with the drug testing. . . ." *Id.* at 9 n. 4. This argument is faulty in two respects. First, the City merges the threshold inquiry of whether urinalysis is a search with the secondary issue of whether such a search is reasonable. Obviously, different employer justifications and employee expectations of privacy are involved in physical examinations and drug tests, and the undisputed proposition that a governmental employer can require urinalysis as part of a routine physical examination does not necessarily mean that urinalysis is not a "search." Second, the City ignores a necessary consequence of its argument. In *Schmerber*, the Court held that the taking of blood to seek evidence of intoxication was a fourth amendment search; it is doubtful that the City is willing to concede that it is therefore precluded from performing blood tests as a component of physical examinations of its employees. This Court concludes that the absence of constitutional problems with physical examinations does not require

the result that the City urges. *See Lovvorn,* 647 F.Supp. at 881 n. 7; *Caruso,* 133 Misc.2d at 555, 506 N.Y.S.2d at 798.

B. *Drug Testing by Urinalysis is an Unreasonable Search Unless Individualized Reasonable Suspicion Exists to Believe that Further Evidence of Drug Use will be Revealed*

In *O'Connor,* Justice Scalia apparently agrees with the plurality's analysis of "reasonableness" of a search of public employees, according the plurality's opinion on this issue the weight of a decision of the Court. To determine the standard of reasonableness, the Court states, "In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." 107 S.Ct. at 1499. Analyzing the "realities of the workplace" and the disruption of routine business, the plurality decided that a warrant requirement for workplace searches not involving criminal investigations would be unduly burdensome. *Id.* at 1500-01. Next, the Court determined whether probable cause is the appropriate standard for employer searches, weighing the public and private interests. On one side of this balance are the government interests in efficient and effective operation of the workplace, tangible damage to the proper operation of the workplace by delays incurred while warrants are sought, and the burden of teaching supervisors the probable cause standard; on the other is "the relatively limited invasion" of employee privacy, which can be further reduced by keeping personal belongings at home. *Id.* at 1501-02. Finding that this balance favors the

employer, the Court held that the probable cause standard would be impractical, and that "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id.* at 1502. Such searches must be reasonable both at their inception and in their scope to pass constitutional muster. Although the Court states that a search is ordinarily "justified at its inception" when there are reasonable grounds for expecting that it will expose evidence of employment-related misconduct, the Court declined to determine whether "individualized suspicion" is an essential element of its standard of reasonableness. *Id.* at 1503. A search is "permissible in scope" when it is reasonably related to its objectives and not excessively intrusive in comparison to the alleged misconduct. *Id.*

O'Connor's standard of reasonableness for employer searches, finally articulated as "reasonableness under the circumstances" is a curious concept indeed. The Court offers little guidance about how this concept shall be given content. *See id.* at 1514 n. 14 (Blackmun, dissenting). Apparently, the public and private interests which are weighed to consider whether a standard of less than the traditional probable cause is indicated will again be considered. *See NFFE,* at 942. Otherwise, it is difficult to imagine how this Court would answer the question left open by the Supreme Court, *i.e.,* whether "individualized suspicion" is required to find that drug testing under the circumstances of this case was reasonable. The *O'Connor* court sidestepped this question; its resolution is central to the litigation before this Court.

Both the employer and employee interests in drug testing by urinalysis are different in nature and weight from their interests in documents and private possessions kept in public offices. *O'Connor*'s concern with an employer's need for access to files and documents in order to effectively operate an office is not implicated here, since urinalysis is rarely an ordinary activity incident to a business. Instead, drug testing by urinalysis involves the other type of search discussed in *O'Connor*—an investigation of employee malfeasance. Nevertheless, the City must demonstrate a nexus between its need for drug testing and work-related misconduct which adversely affects its operations as an employer of police officers. This showing can be made by two methods of factfinding: nonadjudicative factfinding of a compelling need on a national level for urinalysis of police officers, or adjudicative factfinding, by evidence offered in this case, of a compelling need created by circumstances distinctive to this case. *Guiney*, 654 F.Supp. at 1300.

The City's briefs rely on two reasons for compelled drug testing by urinalysis of its recruits for the police department: (1) to preserve the integrity of the department; and (2) to assure that its officers will be fully able to perform their jobs. The City's emphasis is clearly on the former reason. Most courts which have considered drug testing of police officers have agreed that public confidence that law enforcement officers are themselves respectful of the law is critical to sustaining law enforcement's authority and legitimacy. *Von Raab*, 816 F.2d at 178; *Bostic*, 650 F.Supp. at 250; *Palm Bay*, 475 So.2d at 1324; *Fraternal Order of Police*, 524 A.2d at 437; *Caruso*, 133 Misc.2d at 552, 506 N.Y.S.2d at 795. An officer who uses illegal drugs may be susceptible to

bribery, or to a temptation to divert seized drugs, if he or she is called upon to participate in drug-related arrests. *Von Raab,* 816 F.2d at 178. Courts have also recognized that drug use may affect an officer's ability to perform his or her job at an optimal level. *Von Raab,* 816 F.2d at 178; *Bostic,* 650 F.Supp. at 250; *Turner,* 500 A.2d at 1008; *Palm Bay,* 475 So.2d at 1324. However, "[i]n weighing the need against the private intrusion, the courts are persuaded by the absence of a factual showing that drug use is widespread among the affected employees or that it presents an identifiable risk to the public." *Fraternal Order of Police,* 524 A.2d at 436, and cases cited therein. The City's briefs have not attempted to indicate that such findings of fact are appropriate in this case, and it appears that the evidence would not permit a finding of compelling need based upon circumstances unique to the Cleveland Police Department or this particular class of cadets. *See Guiney,* 654 F.Supp. at 1300, and cases cited therein.

The intrusiveness of urinalysis for drug testing must be weighed against these interests. As discussed above, the interest in privacy implicated by urinalysis drug testing is at the heart of the values protected by the fourth amendment, since urinalysis seeks to uncover physiological information and to learn of activities conducted outside the public sphere. Such an intrusion violates the sanctity of personal choices, thoughts, and decisions, which are central to individual liberty. *See AFGE,* 651 F.Supp. at 732; *Capua,* 643 F.Supp. at 1511, 1515. While this Court ascribes to the universally recognized proposition that by accepting government employment, public employees' legitimate expectations of privacy are somewhat less than that of their private sector counterparts, it also recognizes that the nature of

the intrusion in this case is different from the intrusion in *O'Connor.* In this case, public employees cannot avoid exposure of their private information by keeping evidence of it at home. Obviously, "physiological secrets" travel with a person. By the nature of the search and the information sought, then, urinalysis is a much greater invasion of privacy than a search of an employee's office.

Moreover, the act of urination is primarily done with utmost privacy, increasing the intrusiveness of urinalysis. Unlike the taking of blood, passing urine is generally associated with humiliation and embarrassment if it must be conducted in the presence of another. *E.g. Lovvorn,* 647 F.Supp. at 880; *Capua,* 643 F.Supp. at 1514; *Caruso,* 133 Misc.2d at 548, 506 N.Y.S.2d at 793. The City asks this Court to take judicial notice that "there are places of public accommodation, including the Cleveland Stadium, which maintain public toilets for male persons in which acts of urination are performed into an open trough, in full view of numerous strangers of the same sex," and it requests that this Court not "elevate such idiosyncratic sensitivities [of persons avoiding such public toilets] to the norm." The City's opposition brief, at 20 n. 10. Not only is the fact of which the City asks this Court to take notice "legislative" rather than "adjudicative" and thus not governed by Fed.R.Evid. 201; it lacks materiality. Even though male persons sometimes use such public accommodations, women seldom, if ever, do. The privateness of the act of urination is best described in *Von Raab*:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public

> is generally prohibited by law as well as social custom. While individuals may choose not to urinate in private but instead to use public toilet facilities, they make this choice themselves. Moreover, expectations of privacy in a particular activity do not exist on an all-or-nothing basis. . . . [E]ven the individual who willingly urinates in the presence of another does not " 'reasonably expect to discharge urine under circumstances making . . . discover[y of] the personal physiological secrets it holds' " possible.

816 F.2d at 175 (footnotes omitted). Thus, this Court must conclude that urinalysis is particularly intrusive for many people, and certainly quite incomparable to permitting a supervisor to shuffle through papers on a desk.

A comparison of these employer and employee interests reveals that a balance is much more difficult to achieve in this case than in the search of a public employee's office and papers. Naturally, this Court agrees that protecting the integrity and the implied authority of police as law enforcement officers is an important government interest and supports the permissibility of urinalysis. However, the City's reliance on this interest is stated with undeserved hyperbole. Although drug use is currently perceived as a problem of national proportions, it is difficult to perceive why the possibility of drug use should undermine public confidence in law enforcement any more than any number of possible illegalities by police officers would undermine public confidence. Yet it is not suggested that police officers' homes could be systematically searched for signs of other possible illegalities in order to sustain public confidence. Moreover, the interest in job performance is much stronger when there is actual evidence that job performance has suffered. When the

severely intrusive nature of urinalysis is added to this calculation, it is obvious that a reasonable individualized suspicion that a police officer is using illicit drugs must be required for urinalysis to be reasonable under all the circumstances.

Another court within this circuit has explained how the requirement of reasonable individualized suspicion accommodates both the important governmental interests and the employees' constitutional rights:

> The City need not rely on mass drug testing to detect drug usage by members of the Chattanooga Fire Department. If indeed the use of drugs is causing deficient performance on the part of fire fighters, this should be detectable to a considerable extent by properly designed personnel procedures to detect such drug abuse symptoms as absenteeism, aberrant conduct and financial difficulties.

Louvorn, 647 F.Supp. at 883. Judge Edgar found this analysis equally applicable to across-the-board testing of police officers:

> Information concerning drug problems can be acquired by physical observation of police officers, citizen complaints, tips from other law enforcement agencies and other means. . . . [T]his does not mean that the Chattanooga Police Department may not administer urine tests to its police officers for the presence of illegal drugs. This decision does mean that if such tests are given, they must be given on reasonable suspicion, their scope must be related to their objective, and they must not be excessively intrusive.

Penny v. Kennedy, 648 F.Supp. 815, 817 (E.D.Tenn.1986). Judge Edgar's recognition that observational evidence can be used to fulfill the reasonable suspicion standard with respect to police officers is especially astute. Police officers deal closely

with each other on a sustained basis and can be expected to pay attention to any symptoms of drug abuse in their colleagues, since their lives depend on their colleagues' performances. Moreover, *O'Connor*'s concern about the burdens and difficulties of teaching supervisory personnel concepts such as "reasonable suspicion" is inapposite in the case of police officers, since they work with the intricacies of such concepts daily.

The overwhelming majority of cases challenging urinalysis has concluded with decisions either that testing is unconstitutional in the absence of individualized suspicion, or that testing was proper because individualized suspicion was present. In fact, with only one exception, every court considering the validity of the testing of police officers has found an individualized suspicion requirement. *AFGE,* 651 F.Supp. at 735, 738 (civilian law enforcement officers employed by the Army cannot be tested in the absence of reasonable suspicion if their duties are those of ordinary police officers); *Capua,* 643 F.Supp. at 1517; *Bostic,* 650 F.Supp. at 250; *Turner,* 500 A.2d at 1008-09 (upholding police policy permitting testing based upon reasonable individualized suspicion of drug use); *Palm Bay,* 475 So.2d at 1325; *Caruso,* 133 Misc.2d at 557, 506 N.Y.S.2d at 798-99 (reasonable suspicion standard is proper for testing of members of the New York Police Department's Organized Crime Control Bureau). As *AFGE* suggests by distinguishing between "ordinary" police employed by the Army and police with special military functions, it appears that the government must have interests in addition to those articulated by the City in order to alter the balance of interests so that individualized suspicion is not necessary. *See also Fraternal Order of Police,* 524 A.2d at 437 (indicating that "public confidence" interest alone does not outweigh officers' privacy interests).

Because of a perception that the virtual unanimity of federal district courts and state courts in requiring individualized suspicion has been destroyed by recent decisions of federal appellate courts, *see* Noble, *Tests for Drugs Win More Backing,* N.Y. Times, May 18, 1987, at 1, col. 1 (national ed.), it is necessary to analyze each of these decisions individually. In *McDonell v. Hunter,* 809 F.2d at 1302, the Eighth Circuit reviewed the constitutionality of a policy subjecting Department of Corrections employees to numerous searches of their vehicles and persons, including urinalysis. The court conducted the balancing test with an eye toward the threat posed to prison security by drug-using corrections officers who had consistent contact with inmates, and it concluded:

> Because the institutional interest in prison security is a central one, because urinalyses are not nearly so intrusive as body searches, *Shoemaker v. Handel,* 608 F.Supp. 1151, 1158 (D.C.N.J.1985), *aff'd,* 795 F.2d 1136 (3d Cir.1986), and because this limited intrusion into the guards' expectation of privacy is, we believe, one which society will accept as reasonable, we modify the district court's order and hold that urinalyses may be performed uinformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons. Selection must not be arbitrary or discriminatory.

Id. at 1308. The narrowness of this holding is apparent from its very terms, but is underscored by the court's unwillingness to extend across-the-board testing to other prison employees not falling within this select group.

> Urinalysis testing within the institution's confines, other than uniformly or by systematic random selection of those employees so designated,

> may be made only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience that the employee is then under the influence of drugs or alcohol or that the employee has used a controlled substance within the twenty-four hour period prior to the required test.

Id. The extrahazardous nature of prison security, then, appears to tip the balance toward the employer so that, in the Eighth Circuit, individualized suspicion is not necessary when this additional governmental interest is present.[2] *See also Allen,* 601 F.Supp. at 491 (permitting random urinalysis to determine whether drugs affected ability of employees to work with high voltage wires). Perhaps it is such an additional interest which dictated the Seventh Circuit's finding that bus driver rules requiring drug testing after "any serious accident," or on reasonable suspicion, were constitutional. *Division 241 Amalgamated Transit Union v. Suscy,* 538 F.2d 1264, 1267 (7th Cir.) (per curiam), *cert. denied,* 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976). While the *Suscy* court acknowledged its duty to balance individual and public interests, its performance of this balance is cryptic, at best. This Court can accept the *Suscy* rationale to the extent that it depends upon the additional employer factor of investigating an accident.

In *Shoemaker,* 793 F.2d at 1136, the Third Circuit upheld New Jersey Racing Commission regulations requiring random urine testing of jockeys without

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[2] A lesser expectation of privacy in the penological environment also permits drug testing without individualized suspicion of prisoners, *Spence,* 807 F.2d at 755, and *Storms,* 600 F.Supp. at 1220, and probationers. *Williams,* 787 F.2d at 1186 n. 9; *Macias,* 649 S.W.2d at 152. *But see Tucker,* 613 F.Supp. at 1129 (urinalysis of prisoners without individualized suspicion is unconstitutional if not for purpose of prison security).

individualized suspicion. Based upon the traditional intense regulation of the horse racing industry, the court held that the administrative search exception to the fourth amendment which has been applied in closely regulated industries was applicable. This exception was justified because of the strong state interest in conducting such a search (the public perception of integrity in the racing industry), and the reduced expectation of privacy by jockeys because of the pervasive regulation of the industry. *Id.* at 1142. In reaching its conclusion that urinalysis was justified at its inception, the court emphasized that its holding applied only to urinalysis of *voluntary* participants in a highly regulated industry. *Id.* at 1142 n. 5.

Since the *Shoemaker* decision was rendered, almost every governmental entity forced to defend a drug test has urged that it is controlling. Only one court has agreed with this assertion. *Rushton*, 653 F.Supp. at 1525 (upholding "fitness for duty" program at a nuclear facility). Even the *Capua* court, which is within the Third Circuit, ruled that *Shoemaker* must be distinguished from cases involving a broad drug testing program of firefighters and police officers. The reasons that *Shoemaker*'s rationale is inapplicable to cases such as the one *sub judice* are succinctly set forth in *Fraternal Order of Police*:

> Police officers are not members of a "highly regulated industry." Like many other groups of public employees, police officers are subject to a variety of statutory and administrative controls. But government's supervision of its employees cannot be equated with the regulation of sensitive industries requiring "close supervision and inspection." Police are not engaged in a "commercial enterprise"; they are not subject to a

> "comprehensive and defined" regulatory scheme in which drug testing is a "necessary component"; there has been no legislative determination "that warrantless searches are necessary to further a regulatory scheme[.]" To treat the police as a "pervasively regulated industry" would dangerously extend and distort that exception to the warrant requirement beyond its intended scope. We thus find ourselves in agreement with the many courts which have found *Shoemaker* inapplicable to or distinguishable from cases involving public employees. *See, e.g.*, [*AFGE*], 651 F.Supp. 726, 734-35 (S.D.Ga.1986); *Caruso*, 506 N.Y.S.2d at 798.

524 A.2d at 434-35 (citations and footnotes omitted).

Two other cases reaching federal appellate courts did not result in decisions on whether drug testing in the absence of reasonable individualized suspicion is permissible. In *Mack v. United States*, 814 F.2d 120 (2d Cir.1987), the court affirmed the trial court's entry of summary judgment against the plaintiff, a former agent of the Federal Bureau of Investigation who was discharged for cocaine use and making false statements after urinalysis was conducted. However, the appellate court affirmed the district court on the basis that the plaintiff had consented to urinalysis, and it indicated that the district court should not have unnecessarily reached the difficult fourth amendment issues. *Id.* at 124-25. In *NFFE*, the Court of Appeals for the District of Columbia Circuit reversed the trial court's determination that it had no subject matter jurisdiction to consider constitutional challenges to the program also at issue in *AFGE*. It remanded the case to the district court to determine the reasonableness of the search. At 941-42.

The only other pertinent decision is *Von Raab*, where the Fifth Circuit upheld a testing program for some Customs Bureau transfers into "sensitive positions" without a requirement of reasonable individualized suspicion. Espousing a "totality of circumstances" approach, the court cited the following factors: limited scope and manner of the testing program; government justifications for testing; voluntariness of applying for a transfer requiring that the test be taken; the reduced expectation of privacy incident to government employment; the noncriminal nature of the investigation; analogy of drug interception to a regulated industry; lack of alternative information; and the effectiveness of testing. 816 F.2d at 176-80. The court stated, "Taking all of the relevant factors into account, we conclude that the Customs Service program for testing employees who seek a transfer to sensitive positions is not unreasonable." *Id.* at 180.

This Court finds that *Von Raab* is not persuasive with respect to this case. While this Court could take issue with the validity of several of the factors identified by the Fifth Circuit (such as the "voluntariness" and "regulated industry" factors), it finds a more serious flaw in the analysis. The *Von Raab* court does not even identify any employee interests, much less balance them against employer interests. It is not surprising, given that the court can identify only factors favoring testing, that it concludes that testing is constitutionally permissible as a reasonable search. However, even if the court's analysis were persuasive, this Court would find *Von Raab* distinguishable because of its consistent references to the "sensitive" nature of these particular Customs Service positions. Once again, then, there is an additional factor weighing in favor of the reasonableness

of testing without individualized suspicion, distinguishing these agents from ordinary police officers who have greater expectations of privacy. *But cf. Fraternal Order of Police*, 524 A.2d at 437-39 (reasonable suspicion requirement prohibits city policy to test police officers transferring to the narcotics bureau and every two years thereafter; based upon the New Jersey Constitution).

In sum, this Court's analysis of the circumstances leading to the urinalysis of Feliciano and Rojas persuades it that their drug testing was not reasonable in the absence of reasonable individualized suspicion. Application of the reasonable suspicion requirement in this case is dictated by precedent, as well as by this Court's independent assessment of the circumstances. The City admits that it had no individualized suspicion that Feliciano and Rojas used illegal drugs, as it must, based upon the evidence adduced to this Court in support of the summary judgment motions. Therefore, this Court holds that testing for drug use by a urinalysis of Feliciano and Rojas was not reasonable at its inception. Since the drug testing was an unreasonable search, this Court will not continue with an analysis of whether the testing was reasonable in its scope. However, it must evaluate the City's contention that even if the urinalysis was an unreasonable search, plaintiffs consented to the search and cannot claim that their fourth amendment rights were violated.

C. *Plaintiffs did not Consent to Urinalysis*

The City proffers two arguments which it considers to implicate consent by plaintiffs. First, it argues that Feliciano and Rojas consented to urinalysis by seeking a job with the Cleveland Police Department, since public

employment is voluntary. *Second, it submits that* plaintiffs actually consented to urinalysis. The first argument, which the City designated by the rubric "implied consent," requires relatively little discussion.

1. *Implied Consent*

It is hornbook law that public employment cannot be conditioned upon waiver of constitutional rights. *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), and several courts have held in the context of urinalysis that a public employer cannot force consent to an unreasonable search as a condition of employment. *E.g. NFFE,* at 943; *McDonell,* 809 F.2d at 1310. Since this Court has held that urinalysis is an unreasonable search in this case, it must also conclude that the City could not require urinalysis for drug testing as a condition of employment of these plaintiffs during their probationary period.

The City relies upon *Wyman v. James,* 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) in support of its implied consent argument. *Wyman* involved a constitutional challenge to mandatory home visits by caseworkers to recipients of Aid to Families with Dependent Children. The Court held that "we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term." *Id.* at 317, 91 S.Ct. at 386. It relied upon the home visit requirement in the statute and regulations; the rehabilitative and investigative (although non-criminal) nature of the visit; and the argument that the visit was not forced or compelled, since the aid would merely cease if entry was refused. *Id.* Although *Wyman* supports the City's claim, it is simply irreconcilable with *Pickering* and its progeny. Many courts have

distinguished *Wyman* as inapplicable; perhaps the most reasonable way to understand it is as limited to its factual situation. *See Zweibon v. Mitchell*, 516 F.2d 594, 633 n. 94 (D.C.Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 187 (1976). This Court is unaware of any decision relying upon *Wyman* in the drug testing context, and it refuses to do so.

The City also argues that its implied consent theory is supported by a balance of employee and employer interests under *Pickering*. Such a balancing has been performed in this Court's discussion of whether urinalysis is an unreasonable search. Indeed, the implied consent argument is another way of interjecting employer interests which argue for limiting the scope of the fourth amendment in the context of drug testing of public employees. That issue has already been resolved and need not be reconsidered under the rubric of "consent."

2. *Actual Consent*

The City also relies upon plaintiffs' deposition testimony to argue that even if the fourth amendment would otherwise be violated, plaintiffs consented to urinalysis. Plaintiffs respond that any "consent" was not "voluntary."

The Supreme Court probed the concept of the voluntariness of consent to a search in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). It noted that "voluntariness" could not be defined literally, or as "but-for" causation, but should be understood as "an accommodation of the complex of values implicated in police [investigations]." *Id.* at 224, 93 S.Ct. at 2046. The Court held:

> [W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Id. at 248-49, 93 S.Ct. at 2059 (footnote omitted). Factors to be evaluated include the youth of a suspect, lack of education, low intelligence, lack of legal advice about constitutional rights, the length and prolonged nature of an investigative encounter, and the use of physical punishment. *Id.* at 226, 93 S.Ct. at 2047. Threats perceived by an accused because of social discrepancies such as race or sex are also relevant, and the knowledge of the right to refuse consent is highly relevant, although not controlling. *United States v. Mendenhall*, 446 U.S. 544, 558-59, 100 S.Ct. 1870, 1879-80, 64 L.Ed.2d 497 (1980).

In an action under 42 U.S.C. §1983 (1982) for a fourth amendment violation, defendants bear the burden of demonstrating plaintiffs' voluntary relinquishment of their constitutional rights, in the face of a presumption against such a waiver. *Tarter v. Raybuck*, 742 F.2d 977, 980 (6th Cir.1984), *cert. denied*, 470 U.S. 1051, 105 S.Ct. 1749, 84 L.Ed.2d 814 (1985). Voluntariness is an issue of fact, to be decided by the Court. *United States v. Scott*, 578 F.2d 1186, 1189 (6th Cir.), *cert. denied*, 439 U.S. 870, 99 S.Ct. 201, 58 L.Ed.2d 182 (1978). Consent must be proved by clear and positive testimony, and it must be

unequivocal, specific, and intelligently given, uncontaminated by any duress and coercion. *United States v. Williams,* 754 F.2d 672, 674 (6th Cir.1985).

In its argument that Feliciano and Rojas actually consented to urinalysis, the City relies totally on the following deposition testimony:

> Q. Now, if it had been announced in advance, either in the room that you were in or when you first came into the restroom, that the purpose of checking the sample was to test it for the presence of illegal drugs, or other illegal substances, would you have been reluctant or unwilling to voluntarily produce the sample?
>
> A. I don't think we had a choice.
>
> MR. BERGER: Would you please read the question again.
>
> (Question read.)
>
> A. No.
>
> * * *
>
> Q. Was it true that you were willing to take a polygraph test and a blood test?
>
> A. That's correct.
>
> Q. Were you willing to do that throughout the time that you were at the Academy as a police trainee?
>
> A. Yes, I was.
>
> Q. Were you also willing to take urine testing during that entire time as well?
>
> A. Yes, I was.

Feliciano dep., at 26, 34.

> Q. At the time that you produced the sample of urine, did you have any reason, whatsoever, to believe that there would be any evidence of marijuana use, or the use of any other illegal substance, in your urine?
>
> A. No, because—well, I had a prescription. Other than that, no.

Q. Did you have any reason to believe that there would be any evidence of marijuana use in your urine at the time you produced the sample?

A. No.

Q. Now, if you had been told, prior to giving the sample, that the purpose of testing it was to find if there was any evidence of the use of marijuana or any other illegal substance in your urine, would you have refused to give the sample?

A. No.

* * *

Q. Now, Mr. Rojas, did you indicate at the Civil Service Commission hearing that you were prepared to take polygraph and blood tests?

A. Yes, I did.

Q. Was that true?

A. Yes, it was.

Q. Were you willing to do that throughout the time you were at the Academy as a police trainee?

A. Yes, I was.

Q. And was the same true for urine testing, that you were willing to undergo that throughout the time that you were at the Academy for police training?

A. Yes.

Rojas dep., at 18-19, 23-24.

Both plaintiffs qualify their deposition testimony by affidavits further explaining their answers. Feliciano's affidavit indicates that he believed that his employment would be terminated if he did not produce a urine sample; that he would not have submitted it if he had known that drug testing is unreliable or that compulsory urinalysis of government employees is unconstitutional; and that he responded to the question about urine testing with the understanding that it implied that he would not be discharged based on its results. He also

averred that the instructors were wearing guns when they administered the test, which was unusual. Rojas' affidavit is substantially similar.

On this evidence, this Court must find that plaintiffs' fourth amendment rights were not knowingly and freely waived. Regardless of any coercion implied by an environment where the supervising officers were carrying weapons, plaintiffs clearly indicate that they believed that producing the urine sample was necessary to retain their jobs. Just as importantly, plaintiffs could not be expected to know that they were waiving constitutional rights, given the developing fourth amendment jurisprudence with respect to drug testing. Notably, the individual defendants have been granted qualified immunity because they could not know that their actions were unconstitutional; it is astounding that the City submits that plaintiffs could voluntarily waive rights which were unknown to its own supervisory personnel. Finally, plaintiffs' post-deposition explanations of their testimony are entirely credible when the specific questions relied upon by the City are read in the context of the parallel questions about polygraph and blood tests.

The only plaintiffs' responses upon which the City relies are not the sort of "clear and positive" testimony which a defendant must adduce to meet its burden on consent, and thus overcome the presumption against waiver. If the City really believed that consent to the drug tests were unqualified, it would have been simple to ask a few additional questions of the deponents to establish the waiver and assure that its burden was amply satisfied. Instead, the City offers only these few answers to leading questions and maintains that its burden has been met, despite all of plaintiffs' evidence

negating voluntariness. This Court must hold that the City has failed to prove that plaintiffs' production of urine samples was voluntary under all of the circumstances. *See also AFGE,* 651 F.Supp. at 736; *Bostic,* 650 F.Supp. at 249.

In its attempt to pin plaintiffs down to their unqualified deposition answers, the City relies on *Mack,* 814 F.2d at 124, where the Second Circuit held that the evidence showed that the plaintiff had unequivocally consented to urinalysis. It summarized this evidence:

> The waiver form signed by appellant provided that:
>
> > I have been advised that I am under no obligation to provide a urine sample in connection with this administrative inquiry and I have further been advised that any information I supply would not be used against me in any criminal preceeding. Therefore I voluntarily submit to providing a urine specimen. . . .
>
> At his deposition appellant was asked if the government forced him to provide a urine sample. He replied:
>
> > No. I was totally cooperative at that point and happy to provide any information they wanted.

Id. When the plaintiff answered a summary judgment motion with an affidavit indicating that he submitted to the test because of fear of losing his job and coercion, the court held that this affidavit contradicted his deposition testimony and should be disregarded, and that summary judgment should be granted against him on his fourth amendment claim because of consent. *Id.* at 124-25.

It is also the rule of the Sixth Circuit that "[a] party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which

contradicts her earlier deposition testimony." *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453, 460 (6th Cir.1986) (citing *Biechele v Cedar Point, Inc.*, 747 F.2d 209, 215 (6th Cir.1984)). However, affidavits may sufficiently contradict deposition testimony to preclude their use. *See Bender v. Southland Corp.*, 749 F.2d 1205, 1211 (6th Cir.1984). In this case, plaintiffs' affidavits qualify and explain their depositions, rather than contradict them. Moreover, the evidence of consent is entirely distinguishable from that in *Mack*. The quality of plaintiffs' responses were unlike *Mack*'s expositive answer to his deposition question, and Feliciano and Rojas neither signed a waiver form nor were advised that they were not required to give a sample. Because *Mack* is inapposite to this case, this Court must find for Feliciano and Rojas on the issue of consent.

V. CONCLUSION

As this Court has indicated, there is without doubt a perception that the use of illegal drugs is an important problem which affects our national well-being. Indeed, drug use by police officers is especially undesirable, since we rely upon these authorized representatives to enforce our drug laws. However, the warning of Chief Judge Lay of the Eighth Circuit should be heeded:

> The fundamental principles surrounding the fourth amendment still serve us well. Only with the greatest caution should we whittle away basic constitutional rights, for we often come to regret the unfortunate rulings we have made in times of hysteria in the past. *Compare, e.g., Korematsu v. United States*, 323 U.S. 214, 217-19, 65 S.Ct. 193, 194-95, 89 L.Ed. 194 (1944) (exclusion from areas of the west coast during World War II of all persons of Japanese ancestry held constitutional on grounds of military necessity) and *Hirabayashi v. United*

States, 320 U.S. 81, 101, 63 S.Ct. 1375, 1386, 87 L.Ed. 1774 (1943) (finding curfew regulations imposed against citizens of Japanese ancestry not unconstitutionally discriminatory), *with Hohri v. United States*, 782 F.2d 227, 231-39 (D.C. Cir.), *cert. granted*, _____ U.S. _____, 107 S.Ct. 454, 93 L.Ed.2d 401 (1986) (in treating statute of limitations issues raised by money damages claims filed by Japanese-American World War II internees or their representatives, court discusses history of litigation surrounding their internment and notes that the "military necessity" grounds to which the Supreme Court deferred in *Hirabayashi* and *Korematsu* were found by a subsequent congressional commission to be without factual foundation).

McDonell, 809 F.2d at 1310-11 (Lay, concurring in part and dissenting in part). This Court is convinced that the reasonable individualized suspicion standard protects Feliciano and Rojas' fourth amendment rights without significantly impairing the City's ability to remove drug abusers from its ranks.

Plaintiffs' motion for partial summary judgment is granted against the City. Summary judgment is granted to the individual defendants on the fourth amendment claims against them. The City's motion for summary judgment on the merits of the fourth amendment claims is denied. A status call will be held on June 30, 1987 at 4:00 p.m. to set forth further proceedings in this litigation.

IT IS SO ORDERED.

ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

(Filed November 26, 1991)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C85-3356

FELICIANO, *et al.*,
Plaintiffs,

vs.

CITY OF CLEVELAND, *et al.*,
Defendants.

——0——

Case No. C86-4373

GREATHOUSE, *et al.*,
Plaintiffs,

vs.

CITY OF CLEVELAND, *et al.*,
Defendants.

O R D E R

ALDRICH, *J.*

The court has filed its memorandum and order granting summary judgment to the defendants on all claims. Therefore,

IT IS ORDERED that defendants' motions for summary judgment are granted, and final judgment is entered in favor of the defendants.

/s/ ANN ALDRICH
United States District Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT, EASTERN DIVISION

(Filed November 26, 1991)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
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Defendants.

MEMORANDUM AND ORDER

ALDRICH, *J.*

In October of 1985, plaintiffs Raul Feliciano, Jr., Richard Rojas, Valeria Greathouse, Robert Beavers, Richard Zappala, and Darryl Hood (collectively referred

to hereinafter as "the Recruits") were members of the cadet recruit class of the City of Cleveland Police Department. A surprise urinalysis drug test was administered to the entire cadet class during the last week of training, and this test indicated the presence of marijuana or other controlled substances in the urine of twelve cadet class members, including the Recruits. The Recruits resigned from the cadet class. Feliciano and Rojas filed a complaint, and Greathouse, Beavers, Zappala and Hood separately filed another. The Recruits named as defendants the City of Cleveland ("City") as well as several City police officers and other City government employees ("individual defendants").

The two cases were consolidated into this action. The Recruits' lawsuits claim that the defendants violated 42 U.S.C. §1983 when, under color of state law, the defendants conducted an unconstitutional drug test. Specifically, the Recruits allege that the drug testing violated their right to be secure from unreasonable search and seizure under the fourth and fourteenth amendments, and violated their rights to equal protection and due process of law under the fourteenth amendment.

The City filed a motion for summary judgment on the merits. This motion was superseded by the City's supplemental motion for summary judgment, which was joined by the individual defendants. The Recruits moved for partial summary judgment on their fourth amendment claims, and both sides agreed in 1986 to postpone discovery until the Court could rule on the fourth amendment claims alone. In *Feliciano v. City of Cleveland*, 661 F. Supp. 578 (N.D.Ohio 1987) ("*Feliciano I*"), this Court granted the Recruits' motion for partial summary judgment and denied the City's motion for

summary judgment on the fourth amendment claims. In addition, the individual defendants' supplemental motion for dismissal based on qualified immunity was granted with respect to the fourth amendment claims, and deferred with respect to the Recruits' other claims.

In *Feliciano I*, this Court was "convinced that the reasonable individualized suspicion standard" applied to the Recruits. *Id.* at 596. This Court believed that defendants had to suspect each cadet *individually* of illicit drug use before "searching" them with a drug test; mere suspicion that some unidentified cadet class member or members had used illicit drugs was not enough to justify a search of the entire cadet class. Thereafter, however, the Supreme Court held that the individualized suspicion standard did not apply in factually similar cases. In *Skinner v. Railway Labor Executive's Association*, 109 S. Ct. 1402, 1422 (1989), the Supreme Court held that the importance of ensuring safe railroad transportation made it "reasonable to conduct [urinalysis drug] tests in the absence of a warrant or reasonable suspicion that any particular [railway worker] may be impaired." In a companion case, *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1392 (1989), the Supreme Court held that the government may "conduct . . . suspicionless searches . . . of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms." In light of these holdings, this Court vacated *Feliciano I*.

Since *Feliciano I*, all parties have conducted and finished discovery concerning the Recruits' equal protection and due process claims. The Recruits have moved for partial summary judgment on these claims, and the City and individual defendants had earlier moved

for summary judgment on all claims. Thus, this Court must now rule on cross-motions for summary judgment on all claims.

Several years have passed since the Recruits' claims were filed. During that time a good deal of case law addressing urinalysis testing has developed, which must be considered in ruling on the pending motions. For the reasons stated below, the Court now grants defendants' motion for summary judgment on all claims.

I. FACTS

During the week of October 7, 1985, then Chief of Police Hanton received a tip that current members of the police academy were known to use narcotics. Deposition of William T. Hanton ("Hanton dep.") at 4-5. Because no names of implicated cadets were mentioned, Hanton decided that the entire cadet class should be tested for drug abuse. Hanton testimony before Civil Service Commission ("Hanton CSC") at 36-37. A testing plan was developed by Hanton and the medical bureau, Hanton Dep. at 8-9, and Hanton decided to conduct the first surprise drug test of police cadets in Cleveland. Hanton CSC at 38. When Hanton made his decision with respect to testing, he had no reasonable suspicion of drug use by any particular member of the class. *Id.* at 37; Answer, 57. The decision to conduct the drug test was made by Hanton alone, without input from superior governmental officials. Hanton dep. at 9-10; deposition of Reginald Turner, Jr. at 9.

During the morning of Monday, October 21, 1985, all cadets were required to produce urine samples. Answer, 57. At that time, the cadets were beginning their final week of training, and they had already satisfactorily passed a physical examination. Answer, 16. The cadets

were directed to go to a restroom, with the male cadets going to the men's restroom and the female cadets going to the women's restroom. The cadets were escorted from their classroom, one row at a time. Sgt. Bratz informed them that they were undergoing additional medical screening. Deposition of Raul Feliciano, Jr. ("Feliciano dep.") at 18-20. The persons administering the test carried firearms, which was unusual at the academy. Feliciano affidavit of November 12, 1986, at 53; Rojas affidavit of November 12, 1986, at 15. The cadets were provided containers labeled with their names and badge numbers and instructed to produce a urine sample. *Id.* at 21-22; deposition of Richard Rojas ("Rojas dep.") at 16. A superior officer allegedly proclaimed, "We want to see what you have been doing this weekend," and "Everybody pees." Deposition of Richard Zappala ("Zappala dep.") at 36. Feliciano proceeded to produce a sample in a toilet stall. Feliciano dep. at 25. Because all stalls were occupied when Rojas reached the restroom, he was forced to produce his sample in the open at a urinal, where he was watched by Sgt. Bratz and another person. Rojas dep. at 16. Beavers was instructed that he had to produce a urine sample in front of Sgt. Bratz, while standing in the middle of the restroom away from the stalls and urinals. After he was unable to urinate while being watched, Sgt. Bratz allegedly told Beavers, "if you don't piss in the bottle now, you will be terminated for being—for not following a direct order." Deposition of Robert Beavers ("Beavers dep.") at 18-19. Eventually, Beavers was permitted to urinate at a urinal but not in a stall. Valeria Greathouse produced her urine sample in a stall while being carefully watched by an unidentified female police officer. Deposition of Valeria Greathouse ("Greathouse dep.") at 19-20.

Once a sample was obtained, it was returned to a box with other samples. Feliciano dep. at 25; Rojas dep. at 17. The cadets gathered in a lounge until everyone had produced a sample. Rojas dep. at 18. Sgt. Bratz entered the lounge and indicated that he did not know what was happening with respect to the sample collection. When everyone had finished, the cadets returned to the classroom. *Id.*

The cadets' urine samples were sent to Smith Kline Miles Laboratory in Beachwood, Ohio, where they were screened for the most commonly abused drugs, including marijuana and cocaine. Karin Rash testimony before Civil Service Commission ("Rash CSC") at 7. Smith Kline subjected each urine sample to two tests: a thin layer chromatography ("TLC") test and an enzyme immunoassay ("EMIT") test. Deposition of Karin Rash ("Rash dep.") at 5-11, 16-19. Those samples that tested positive under either of these tests were confirmed with a radioactive immunoassay ("RIA") test. The samples provided by the Recruits tested positive for marijuana. Rash CSC at 12. The Recruits' samples were all retested the next day, with the same results. Rash CSC at 13. All the samples were also retested later in Smith Kline's St. Louis office, using a gas chromatography/mass spectrometry ("GC/MS") test, for reconfirmation purposes. Rash dep. at 16-19. The GC/MS test again indicated the presence of metabolized marijuana in the urine of each of the Recruits.

On October 22, 1985, those cadets who had tested positive were all separately interviewed by a panel of three officers. Feliciano dep. at 26; Rojas dep. at 19. Each was told that traces of marijuana had been found in his or her urine. Feliciano testimony before Civil Service Commission ("Feliciano CSC"), at 31-32; Rojas

testimony before Civil Service Commission ("Rojas CSC"), at 6. The Recruits all maintained that they had not recently smoked marijuana; some claimed that they had been present at parties the prior weekend at which marijuana had been smoked by others, but that they had not smoked it themselves; others stated that they had smoked marijuana but not in the recent past. Feliciano dep. at 27-28; Rojas dep. at 20-21. The three-officer panel informed the Recruits that they had the options of resigning or facing probable termination by Safety Director Turner the next day. Feliciano CSC at 34; Rojas CSC at 6, 14-15. None of the Recruits resigned at that time.

After roll-call the next day, October 23, 1985, several cadets were separated from those in the classroom. At about 2:30 p.m., Chief of Police Hanton, accompanied by other officers, told these cadets that at 4:00 p.m. they would be terminated for violating their probation period. Rojas CSC at 7-8; Hanton CSC at 3-7. After Hanton and the other officers left, Sgt. James presented the Recruits with previously prepared letters of resignation, which he indicated could be submitted by the Recruits in lieu of termination. Rojas CSC at 8; Feliciano CSC at 29. The Recruits all signed these resignation letters. Rojas CSC at 9; Feliciano CSC at 29.

Several of those cadets who had resigned later wrote letters of appeal to the Civil Service Commission ("CSC"), each alleging that their resignation had been coerced and requesting a hearing. Letter from Raul Feliciano to CSC; CSC minutes from Dec. 16, 1985 ("CSC minutes") at 5. Initially, the CSC answered that no hearing would be held. CSC minutes at 5; letter dated Nov. 6, 1985, from CSC to Raul Feliciano. Later, however, because of the number of cadets who claimed

coercion, the CSC notified these cadets that a hearing would be held to determine the voluntariness of the resignations. *Id.*; letter dated Dec. 9, 1985 from CSC to Raul Feliciano. A hearing was held on Dec. 16, 1985, at which the only cadets in attendance were Zappala, Feliciano, and Rojas. Pursuant to the hearing, the CSC determined that Zappala's, Feliciano's, and Rojas's resignations were voluntary and not coerced. CSC minutes from Jan. 3, 1986.

II. STANDARDS FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

The nature of materials properly presented in a summary judgment pleading is set forth in Federal Rule of Civil Procedure 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth

> specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

III. QUALIFIED IMMUNITY OF THE INDIVIDUAL DEFENDANTS

On January 22, 1986, the individual defendants moved for dismissal or summary judgment on the ground of qualified immunity. That motion was denied by this Court on April 11, 1986, and an interlocutory appeal was taken. A year later, the Sixth Circuit reversed this Court's decision. After making clear that

the individual defendants' qualified immunity appeal implicated only the Recruits' fourth amendment claims, the court concluded:

> [o]ur determination does not affect in any way the right of the plaintiffs to pursue the remainder of their claims against these defendants or against the City of Cleveland. We only hold that the trial judge was obliged to determine upon the motion made by the [individual] defendants that they were immune from personal liability in damages for any claim of violation of fourth amendment rights arising from the mandated urine testing.

Fecliciano v. City of Cleveland, No. 86-3436, slip op. at 3 (6th Cir. April 10, 1987). Thus, to the extent that the individual defendants' supplemental motion for dismissal or summary judgment, filed on April 16, 1987, requests that this Court dismiss the fourth amendment claims against the individual defendants as mandated by the Sixth Circuit, that motion is granted.

The supplemental motion also requests that judgment be entered for the individual defendants on the remaining claims of the Recruits' complaint, or that these claims against them be dismissed. The Recruits have objected to the motion on procedural grounds. This Court is unpersuaded by the Recruits' procedural arguments. As discussed below, however, the Court finds invalid the Recruits' claims that the individual defendants violated the Recruits' rights under the fourteenth amendment. Therefore, the Court grants summary judgment for the individual defendants on the remaining claims of the Recruits' complaint.

IV. FOURTH AMENDMENT ANALYSIS

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The fourth amendment is applied to the states and their subdivisions through the fourteenth amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961), and it restricts the activities of civilian authorities as well as law enforcement officers. *New Jersey v. T.L.O.*, 469 U.S. 325, 335-37 (1985). Thus, the conduct of governmental employers is governed by the fourth amendment. *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality opinion).

The fourth amendment does not restrict all searches and seizures by government, but it does prohibit all *unreasonable* searches and seizures. Accordingly, the analysis of an alleged fourth amendment violation proceeds in two steps. First, the Court must determine whether the government's conduct constitutes a search or seizure by infringing a legitimate expectation of privacy. Second, if a search or seizure is indicated, the Court must determine whether the search or seizure was reasonable. *Id.* If a search or seizure was authorized by legitimately given consent, however, it is wholly valid. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (citing *Katz v. United States*, 389 U.S. 347, 358 (1967), and *Vale v. Louisiana*, 399 U.S. 30, 35 (1970)).

A. Reasonableness of the search

As applied to this case, fourth amendment analysis makes it clear that the government's actions in conducting urinalyses of the Recruits did constitute a

search. "Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment." *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1397 (1989). Therefore, the issue here is whether the urinalysis search conducted was reasonable.

To determine whether a urinalysis testing program is reasonable requires use of a balancing test weighing "the public interest in the . . . testing program against the privacy concerns implicated by the" urinalysis. *Id.* On one side of the scales are the government's "compelling interest[s] in preventing illicit drug use and in preserving the lives of the citizenry," *Id.*; on the other side are the substantial privacy concerns implicit in "the intrusiveness of the collection process," *Skinner v. Railway Labor Executives Ass'n*, 109 S. Ct. 1402, 1418 (1989), and in the physiological revelations that chemical analysis of urine can provide. The Supreme Court weighed these concerns in *Von Raab* to determine whether urinalysis testing of Customs Service officials was constitutional, and held that "[w]hile reasonable tests to elicit [drug use] information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests." Therefore, the Supreme Court ruled "that the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions which require the incumbent to carry a firearm, is reasonable." *Von Raab*, 109 S. Ct. at 1397.

Skinner and *Von Raab* speak directly to the instant case. When the Recruits were subjected to urinalysis testing they were just a few days away from graduation, at which time they would receive firearms and begin patrolling city streets and enforcing drug laws. If "[t]he Customs Service is our Nation's first line of defense against [the importation of illicit drugs,] one of the greatest problems affecting the health and welfare of our nation," *id.* at 1392, then city police forces are our Nation's first line of defense against the distribution and use of those drugs. Thus, there is no question that the City had a compelling interest in ensuring that the Recruits were "sympathetic to their mission of interdicting narcotics," were "physically fit with unimpeachable integrity and judgment," and were less likely to "suffer from impaired perception and judgment . . . [at times when] they [would] need to employ deadly force." *Id.* at 1393.

Against these compelling governmental interests must be weighed the privacy interests of the Recruits. These privacy interests are substantial. "[C]hemical analysis of urine . . . can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic," *Skinner* 109 S. Ct. at 1413, as well as whether she is using oral contraceptives, *United States Workers of America v. U.S.S.*, No. 89-1546, 1989 U.S. Dist. LEXIS 3246, at *8 (E.D. Penn. March 29, 1989). Moreover, the act of urination itself is highly personal. " 'There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without observation; indeed, its performance in public is generally prohibited by law as well as social custom.' "

Skinner, 109 S. Ct. at 1413 (*quoting National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987), *affirmed in part and vacated in part*, 109 S. Ct. 1384 (1989)).

It must be recognized, however, that the Recruits' "expectations of privacy . . . are diminished by reason of their participation in an [occupation] that is regulated pervasively," *Id.* at 1418, and "that certain forms of public employment may diminish privacy expectations even with respect to such personal searches." *Von Raab*, 109 S. Ct. at 1393. During their training, the Recruits had been provided with the Cleveland Division of Police Manual of Rules and Regulations. This manual outlined extensive limitations on the Recruits, including rules concerning prohibited conduct, required "military courtesy," the wearing of uniforms, personal appearance and grooming standards, and the use of profanity. Before entering the police academy, the Recruits had to undergo extensive screening, including medical and physical testing and psychological examination. Counsel for the City is probably accurate when it says that "[n]o Cleveland employee has a lower expectation of privacy than a Cleveland police officer in her probationary period." Defendants' brief filed Sept. 14, 1990, at 7. Given the Recruits' overall diminished expectation of privacy, it is fair to say that they also have a "diminished expectation of privacy in respect to the intrusions occasioned by a urine test." *Von Raab*, 109 S. Ct. at 1394.

If the balancing test to determine whether the Recruits' urine testing was constitutional were to stop here, this Court's task would be simple. The Recruits' diminished expectations of privacy, measured against the government's established compelling interests, would

clearly call for a finding that the circumstances surrounding the Recruits' urinalyses suffered no fourth amendment defect. However, in *Skinner* and *Von Raab* the Supreme Court weighed another important factor before reaching its conclusions. The Supreme Court carefully premised its *Skinner* and *Von Raab* decisions on the existence of specific procedures surrounding the collection and analysis of the urine samples, procedures that "significantly minimize the program's intrusion on privacy interests." *Id.* at 1394 n.2. The *Skinner* court was careful to state that its holding was reached "[i]n light of the limited discretion exercised by the . . . employers under the [urine test] regulations." *Skinner*, 109 S. Ct. at 1422.

Von Raab and *Skinner* were quite specific in their descriptions of the regulations which surrounded the challenged urine tests. For example, *Von Raab* identified these procedures which, because they were in place, secured the constitutionality of the Customs Service's urine testing programs:

> Only employees who have tentatively been accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions. Employees are also notified in advance of the scheduled sample collection, thus reducing to a minimum any "unsettling show of authority" . . . that may be associated with unexpected intrusions on privacy. . . . There is no direct observation of the act of urination, as the employee may provide a specimen in the privacy of a stall.
>
> Further, urine samples may be examined only for the specified drugs. The use of samples to test for any other substances is prohibited. . . . And, as the court of appeals noted, the combination of the

> EMIT and GC/MS tests required by the Service is highly accurate, assuming proper storage, handling, and measurement techniques. . . . Finally, an employee need not disclose personal medical information to the Government unless his test result is positive, and even then any such information is reported to a licensed physician. Taken together, these procedures significantly minimize the intrusiveness of the Service's drug screening program.

Von Raab, 109 S. Ct. at 1394 n.2 (citations omitted). In addition, the *Von Raab* Court found it noteworthy that test results could not be turned over to a criminal prosecutor without the employee's written consent. *Id.* at 1389.

Similarly, in *Skinner* the Supreme Court discussed specific procedures surrounding the urine testing which contributed to its finding that the search was reasonable. Chemical analysis of the urine was initially done via immunoassay and then confirmed by gas chromatography/mass spectrometry, an especially accurate method. *Skinner*, 109 S. Ct. at 1409, n.3. Employers were required to "notify employees of the results of the tests and afford them an opportunity to respond in writing before preparation of any final investigative report." *Id.* at 1409. If urine test results were to be used in a disciplinary proceeding, "the employee must be given the opportunity to provide a blood sample for analysis at an independent medical facility." *Id.* at 1410. As for initial collection of the urine,

> [t]he regulations do not require that samples be furnished under the direct supervision of a monitor, despite the desirability of such a procedure to ensure the integrity of the sample. . . . The sample is also collected in a medical environment, by personnel unrelated to the . . . employer, and is thus not unlike similar procedures encountered often in the context of a regular physical examination.

Id. at 1418 (citations omitted). The Supreme Court further noted that the tests were of a "standardized nature", that "minimal discretion was vested in those charged with administering the program," and that "[b]oth the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees." *Id.* at 1415-16.

The procedures surrounding the drug testing of the Recruits stand in stark contrast to those outlined in *Skinner* and *Von Raab*. The City's decision to undertake drug testing of the police cadets was made only several days before it was done. Because the group drug test was the first of its kind ever conducted by the City, no written procedures or regulations were created or contemplated beforehand.[1] The test was a complete

[1] The City Civil Service Commission had published a Manual of Medical Standards and Prerequisites for Police And Fire Service Applicants ("Manual"), which stated that applicants to the police force would receive a complete physical examination, including "complete urinalysis." Applicants could be rejected if the urinalysis (or any other physical test) revealed "the repeated use of any drug or chemical substance, including marijuana, with such frequency that it appears that the examinee has accepted the use of or reliance on these substances as part of his pattern of behavior," although "cases indicating use of marijuana (not habitual use) or experimental or casual use of other drugs . . . may be waived by competent authority . . . providing there is evidence of current drug abstinence." *See Shield Club v. City of Cleveland*, 647 F. Supp. 274 (N.D. Ohio 1986) (discussing the drug testing provisions in the Manual and finding that they were not racially discriminatory).

The City claims that the group drug test at issue was merely a "final phase" of medical examination and that it followed established procedures as provided in the Manual. The Manual, however, provides for no real procedures except to authorize that urinalysis may be performed. Furthermore, to the extent that the Manual implies the

(Footnote continued on following page.)

surprise to the Recruits. During the test, several of the Recruits were directly observed during urination. The personnel collecting the urine samples were the Recruits' superior officers, not unknown medical workers. The test was given in common bathroom areas. Greathouse tells that she was forced to urinate in an open stall while another police officer stooped to watch her urinate. Beavers suggests that certain male cadets were specifically singled out to urinate under direct observation, in an open area away from urinals or stalls, while other male cadets were allowed to urinate unobserved. Chief of Police Hanton stated that "if criminal information had come forth from any of the recruits as to where they were buying the illegal substance they were ultimately found to be using, it might have ended in a criminal investigation on the other end of it." Deposition of William Hanton at 16-17. Such an investigation could easily have resulted in the filing of criminal charges against the Recruits for illegal drug possession or distribution.

Even the written procedures of the Smith Kline laboratory, which conducted the actual chemical analysis of the Recruits' urine, may have been deficient. The urine tests in both *Von Raab* and *Skinner* involved chemical analysis via immunoassay confirmed by gas

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(Footnote continued from preceding page.)

existence of procedures surrounding urinalysis, the overwhelming suggestion is that any urinalysis would be performed in connection with a full individual medical examination under the auspices of a doctor—not an informal, unannounced group gathering for urine collection. The Court does not believe that the surprise drug test of the cadets, *as conducted*, was ever truly construed by the City as falling within the procedures set forth in the Manual, and Chief Hanton admitted as much when he agreed that he had no "planned procedure to carry out the drug testing" in writing or otherwise. Hanton dep. at 18.

chromatography/mass spectrometry ("GC/MS"). This fact is significant because GC/MS is a highly accurate confirmatory test, whereas enzyme immunoassay ("EMIT") and radio immunoassay ("RIA") tests can produce a high amount of false positives. *Skinner*, 109 S. Ct. at 1409 n.3; K. Zeese, *Drug Testing Legal Manual*, §2.02[1][a] (1988) (immunoassay tests produce "false positive problems of up to 10 percent of urine specimens under some conditions"). Not only are EMIT and RIA tests relatively less accurate than GC/MS, "they are highly cross-reactive," meaning that a false positive on an EMIT test will often produce a false positive on an RIA test as well. K. Zeese, *supra*, at §2.02[1]. For this reason, "it is essential that positive [immunoassay] test results be confirmed by an alternative ... testing technique." *Id.* The Federal Drug Administration urges that GC/MS be used as a confirmatory test. *Id.* at §2.01[1]. Among other federal executive agencies, the United States Department of Transportation and the United States Department of Health and Human Services accept only GC/MS results as a confirmatory test. 49 C.F.R. §40.29(f) (Oct. 1, 1990); *American Fed'n of Gov't Employees v. Skinner*, 885 F.2d 884, 887-88 (D.C. Cir. 1989) (citing Health and Human Services Regulation §2(4)(e)-(f) (Apr. 11, 1988), *cert. denied*, 110 S. Ct. 1960 (1990).

Unlike *Skinner* and *Von Raab*, however, where the GC/MS test was used as the confirmatory test, two immunoassay tests were used in this case. The Smith Kline testing laboratory first used the EMIT test, and then confirmed any positive results with the RIA test. As a result of positive readings on these tests alone, the Recruits were asked to choose immediately between resignation or termination. Oddly, a GC/MS test *was*

performed on the Recruits' urine samples, but not until one week *after* the Recruits had resigned. It is unclear whether the GC/MS test was performed at the request of the City or was done for internal laboratory purposes. Rash Dep. at 59-68. The GC/MS test confirmed the EMIT/RIA positive readings for all the Recruits.

To summarize, the City provided no notice to the cadets that drug testing would or could occur; directly observed some of the recruits during urination; did not conduct the test in a medical environment; had superior officers, instead of medical personnel (who were in the same building), conduct the observations and collections; had no written procedures governing the scope of the analysis of the urine; had no written procedures governing whether criminal prosecutions would or could result; used chemical testing procedures which, though accurate in this case, are widely regarded as incomplete; and generally gave unabridged discretion to those charged with administering the program.

It is at this point that the balancing test in this case becomes difficult. The Supreme Court recognized that established procedures surrounding urinalysis testing were important, and set them out in detail, precisely because employees subject to testing have been accorded only diminished expectations of privacy. Without detailed procedures, employers could, in their discretion, invade the privacy of their employees without restriction. The regulations surrounding urinalysis drug testing are in a very real sense a last line of defense, safeguarding the limited privacy left to these employees. Absent this procedural protection, an employee's "diminished expectations of privacy," *Skinner,* 489 U.S. at 628, can quickly be reduced to "no expectations of privacy." Police officers do not forfeit their fourth amendment

rights "merely because they work for the government instead of a private employer." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987).

Nonetheless, the procedures identified in the *Skinner* and *Von Raab* cases are certainly not requirements. For example, although *Von Raab* identified the absence of visual observation of urination as a factor in determining the reasonableness of a urinalysis search, the drug test procedures in *Skinner* allowed visual observation, *Skinner* 109 S. Ct. at 1418, and drug testing programs with procedures entailing visual observation have since been upheld. *Strawder v. City of Chicago*, No. 87-C-5012, 1989 U.S. Dist. LEXIS 12541, at *17-*19 (E.D.Ill. Oct. 19, 1989). Likewise, the *Skinner* regulations did not actually forbid turning urinalysis test results over to prosecutorial authorities, although no testing program has been challenged for doing so. Furthermore, the failure of a program to use medical personnel in medical surroundings during the urine collection process has been held not to constitute an unreasonable search of safety-sensitive transportation employees. *Id.; Burka v. New York City Transit Authority*, 739 F. Supp. 814, 831 (S.D.N.Y. 1990). Thus, the failure of the City to follow particular procedures does not automatically make its drug testing of the Recruits unconstitutional. Instead, the Court must return to its balancing test. The Court must weigh not only the government's compelling interests and the employees' substantial privacy interests, but also the adequacy of the government's procedures to protect their employees' privacy interests.

This Court agrees that "a particularly strong governmental interest in testing without suspicion, and a lower than normal privacy interest, are the two most important [factors in its balancing test]. Also relevant,

but clearly less significant in the Court's view, are the procedural safeguards which the testing program under scrutiny erects in order to minimize its intrusiveness." *Strawder,* 1989 U.S. Dist. LEXIS 12541, at *11. The Court also notes that

> [p]recedent is unclear on what effect . . . aberrations from the factual circumstances present in *Skinner* and *Von Raab* should have on the evaluation of the reasonableness of the search. The D.C. Circuit recently observed that the use of the Supreme Court drug testing cases as a tool for determining whether the balance of private and government interests satisfies the Fourth Amendment "presents a delicate task." [*Harmon v. Thornburgh,* 878 F.2d 484, 488 (D.C. Cir. 1989), *cert. denied,* 110 S. Ct. 865 (1990).]
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> "The [Supreme] Court did not . . . indicate whether it deemed the [Von Raab] case a close one, in the sense that minor variations in the facts would have tipped the balance in the other direction. Nor did it indicate which (if any) of the relevant factors would be essential to a constitutional testing plan." *Id.* at 488-89.

Burka v. Newark City Transit Authority, 739 F. Supp. 814, 831 (S.D.N.Y. 1990).

That this balancing test is a delicate task, however, does not mean that conscientious deliberation cannot make the answer clear. Careful reflection has convinced this Court that the search undertaken by the City was unconstitutional. It is not the lack of a specific directive governing visual inspection of urination, or the absence of a precise regulation establishing the location of urine collection, that concerns this Court. Rather, it is the entire lack of established guidelines governing virtually *every aspect* of the drug testing program which tips the balance in favor of the Recruits.

The *Von Raab* Court notes that the written Customs Service procedures prevent "the grave potential for 'arbitrary and oppressive interference with the privacy and personal security of individuals.' " *Von Raab,* 109 S. Ct. at 1394 n.2 (quoting *United States v. Martinez-Fuerte,* 428 U.S. 543, 554 (1976)). Established procedures give employees advance knowledge of the possibility of urine testing, which "reduc[es] to a minimum any 'unsettling show of authority.' " *Id.* (quoting *Delaware v. Prouse,* 440 U.S. 648, 657 (1979). Indeed, the presence of *any* rational regulations, if followed, is likely to limit the discretion of a governmental employer sufficiently to minimize the intrusiveness of the testing program and to protect the employees' already limited privacy interests.

The nearly complete lack of regulations in this case, however, did lead to abuse of discretion, unsettling shows of authority, and excessive, arbitrary and oppressive invasion of privacy. The Recruits were not allowed to urinate alone, but were ordered to urinate in groups. At the discretion of certain police officers, some Recruits were singled out and told to stand in the middle of the communal bathroom for observation while urinating; others were left to urinate unobserved. Those Recruits who were singled out were forced to bare their genitalia not merely to unknown medical personnel, but to their superior officers. One Recruit, temporarily unable to produce a sample, was ordered to urinate under direct observation or face immediate termination. Even those Recruits who were not singled out were met with offensive and flippant remarks, such as "Everybody pees" and "We want to see what you have been doing this weekend." Such conduct is arbitrary; it is indiscreet; it is unsettling.

"In order to survive the required Fourth Amendment balancing, it [is] imperative that sufficient safeguards be incorporated to protect 'against abuse of official discretion in deciding whom and how to search.' " *Tanks v. Greater Cleveland Regional Transit Authority*, 739 F. Supp. 1113, 1123 (N.D. Ohio 1990) (Krenzler, J.) (quoting *Transport Workers' Union, Local 234 v. SEPTA*, 863 F.2d 1110, 1121 (3d Cir. 1988)), *aff'd*, 930 F.2d 475 (6th Cir. 1991). Sufficient safeguards were not present in this case. Apart from possible technical deficiencies in the urinalysis itself, this Court is convinced that, even though it may be that "[n]o Cleveland employee has a lower expectation of privacy than a Cleveland police officer in her probationary period," the search conducted by the City was not reasonable. The Court finds that the urinalysis of governmental employees as actually conducted by the City in this case offends the constitution.[2]

B. Consent

The Court's fourth amendment analysis, however, does not end with a finding that the drug testing of the Recruits as performed by the City was unconstitutional. Even if the urinalysis was an unreasonable search, the Recruits cannot claim that their fourth amendment

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[2] The drug test in question in *Burka v. New York Transit Authority*, 739 F. Supp 814 (S.D.N.Y. 1990), also suffered lack of procedures to protect the employees' privacy. The *Burka* court noted that the defendant's drug test procedures gave no notice to at least some of the employees, allowed urine collection to take place in an unprofessional, non-medical environment, and used chemical analysis techniques of questionable validity. *Id.* at 830-31. The *Burka* court upheld this search as to safety-sensitive employees. *Id.* at 831-32. The *Burka* court, however, was not presented with facts, as here, that defendants invaded the employees' privacy with virtually unbridled discretion.

rights were violated if they consented to the search. The City claims that the Recruits did, indeed, consent. The City first argues that since public employment is voluntary, the Recruits consented to urinalysis by implication when they sought a job with the Cleveland Police Department. Second, the City submits that the Recruits explicitly gave their actual consent to urinalysis. These arguments are dealt with separately.

1. *Implied Consent*

It is hornbook law that public employment cannot be conditioned upon waiver of constitutional rights, *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), and several courts have held in the context of urinalysis that a public employer cannot force consent to an unreasonable search as a condition of employment. *See, e.g., Ford v. Dowd*, 931 F.2d 1286, 1294 (8th Cir. 1991); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987); *McDonell v. Hunter*, 809 F.2d 1302, 1310 (8th Cir. 1987). Since this Court has held that the urinalysis conducted in this case was unreasonable, it must also conclude that the City could not require urinalysis for drug testing as a condition of continued employment of the Recruits during their probationary period.

The City relies upon *Wyman v. James*, 400 U.S. 309 (1971), in support of its implied consent argument. *Wyman* involved a constitutional challenge to mandatory home visits by caseworkers to recipients of Aid to Families with Dependent Children. The Court held that "we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term." *Id.* at 317. It relied upon the home visit requirement in the statute and regulations;

the rehabilitative and investigative (although non-criminal) nature of the visit; and the argument that the visit was not forced or compelled, since the aid would merely cease if entry was refused. *Id.* Although *Wyman* supports the City's claim, it is simply irreconcilable with *Pickering* and its progeny. Many courts have distinguished *Wyman* as inapplicable; perhaps the most reasonable way to understand it is as limited to its factual situation. *See Zweibon v. Mitchell*, 516 F.2d 594, 633 n.94 (D.C.Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). This Court is unaware of any decision relying upon *Wyman* in the drug testing context, and it refuses to do so. *See Von Raab*, 109 S. Ct. at 1394 n.2; *Fowler v. New York City Dept. of Sanitation*, 704 F. Supp. 1264, 1271 n.5 (S.D.N.Y. 1989) (distinguishing *Wyman* in the context of drug testing).

The City also argues that its implied consent theory is supported by a balance of employee and employer interests under *Pickering*. Such a balancing has been performed in this Court's discussion of whether the urinalysis conducted by the City in this case was an unreasonable search. Indeed, the implied consent argument is another way of interjecting employer interests that argue for limiting the scope of the fourth amendment in the context of drug testing of public employees. That issue has already been resolved and need not be reconsidered under the rubric of "consent."

2. *Actual consent*

The City also relies upon the Recruits' deposition testimony to argue that even if the fourth amendment would otherwise be violated, the Recruits explicitly consented to urinalysis. The Recruits respond that any

"consent" was not "voluntary." The Supreme Court probed the concept of the voluntariness of consent to a search in *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). It noted that "voluntariness" could not be defined literally, or as "but-for" causation, but should be understood as "an accommodation of the complex of values implicated in police [investigations]." *Id.* at 224. The Court held:

> [W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Id. at 248-49 (footnote omitted). Factors to be evaluated include the youth of a suspect, lack of education, low intelligence, lack of legal advice about constitutional rights, the length and prolonged nature of an investigative encounter, and the use of physical punishment. *Id.* at 226. Threats perceived by an accused because of social discrepancies such as race or sex are also relevant, and the knowlege of the right to refuse consent is highly relevant, although not controlling. *United States v. Mendenhall,* 446 U.S. 544, 558-59 (1980).

In ths action under 42 U.S.C. §1983 for a fourth amendment violation, defendants bear the burden of demonstrating the Recruits' voluntary relinquishment of their constitutional rights, in the face of a presumption against such a waiver. *Tarter v. Raybuck,* 742 F.2d 977,

980 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985). Voluntariness is an issue of fact, to be decided by the Court. *United States v. Scott*, 578 F.2d 1186, 1189 (6th Cir. 1978), *cert. denied*, 439 U.S. 870 (1978). Consent must be proved by clear and positive testimony, and it must be unequivocal, specific, and intelligently given, uncontaminated by any duress and coercion. *United States v. Williams*, 754 F.2d 672, 674 (6th Cir. 1985).

In its argument that the Recruits actually consented to urinalysis, the City relies heavily on two factors: first, that the Recruits had taken a course on constitutional law as part of their academy training and had learned that they had a right to refuse such a search; and second, that the Recruits testified at deposition that they had consented to the urinalysis. The Court is not persuaded by either of these two contentions. As to the Recruits' education in constitutional law, it took the Supreme Court's rulings in *Von Raab* and *Skinner* to clarify the legitimacy of this type of urinalysis search. The Recruits cannot have known whether they had a right to refuse the drug test, especially since the presence of adequate procedural safeguards would have secured the constitutionality of the search. As to the deposition testimony of the Recruits suggesting actual consent, the City relies specifically on the following statements of cadets Feliciano and Rojas (similar testimony was also elicited from most of the other Recruits):

> Q. Now, if it had been announced in advance, either in the room that you were in or when you first came into the restroom, that the purpose of checking the sample was to test it for the presence of illegal drugs, or other illegal substances, would you have been reluctant or unwilling to voluntarily produce the sample?
>
> A. I don't think we had a choice.

MR. BERGER: Would you please read the question again.

A. No.

Q. Was it true that you were willing to take a polygraph test and a blood test?

A. That's correct.

Q. Were you willing to do that throughout the time that you were at the Academy as a police trainee?

A. Yes, I was.

Q. Were you also willing to take urine testing during that entire time as well?

A. Yes, I was.

Feliciano dep. at 26, 34.

Q. At the time that you produced the sample of urine, did you have any reason, whatsoever, to believe that there would be any evidence of marijuana use, or the use of any other illegal substance, in your urine?

A. No, because—well, I had a prescription. Other than that, no.

Q. Did you have any reason to believe that there would be any evidence of marijuana use in your urine at the time you produced the sample?

A. No.

Q. Now, if you had been told, prior to giving the sample, that the purpose of testing it was to find if there was any evidence of the use of marijuana or any other illegal substance in your urine, would you have refused to give the sample?

A. No.

Q. Now, Mr. Rojas, did you indicate at the Civil Service Commission hearing that you were prepared to take polygraph and blood tests?

A. Yes, I did.

Q. Was that true?

A. Yes, it was.

Q. Were you willing to do that throughout the time you were at the Academy as a police trainee?

A. Yes, I was.

Q. And was the same true for urine testing, that you were willing to undergo that throughout the time that you were at the Academy for police training?

A. Yes.

Rojas dep. at 18-19, 23-24.

Both Feliciano and Rojas qualified their deposition testimony by affidavits further explaining their answers. Feliciano's affidavit indicates that he believed his employment would be terminated if he did not produce a urine sample; that he would not have submitted it if he had known that drug testing is unreliable or that compulsory urinalysis of government employees is unconstitutional; and that he responded to the question about urine testing with the understanding that it implied that he would not be discharged based on its results. Rojas's affidavit is substantially similar.

On this evidence, this Court must find that the Recruits' fourth amendment rights were not knowingly and freely waived. Feliciano and Rojas clearly indicate they believed that producing the urine sample was necessary to retain their jobs, which vitiates any "consent." *See Ford v. Dowd*, 931 F.2d 1286, 1294 (8th Cir. 1991) ("a Government employer cannot require that an employee consent to an unreasonable drug search at the risk of the employee's losing his or her job"). Just as importantly, the Recruits could not be expected to know that they were waiving constitutional rights, given the developing fourth amendment jurisprudence with respect to drug testing. Notably, the individual defendants have been granted qualified immunity because they could not know that their actions were unconstitutional; it is astounding that the City submits that the Recruits could voluntarily waive rights which were unknown to its own

supervisory personnel. Finally, the Recruits' post-deposition explanations of their testimony are entirely credible when the specific questions relied upon by the City are read in the context of the parallel questions about polygraph and blood tests.

The responses of the Recruits upon which the City relies are not the sort of "clear and positive" statements that a defendant must adduce to meet its burden on consent, and thus overcome the presumption against waiver. If the City really believed that the Recruits' consents to the drug tests were unqualified, it would have been simple to ask a few additional questions of the deponents to establish the waiver and assure that its burden was amply satisfied. Instead, the City offers only these few answers to leading questions and maintains that its burden has been met, despite all of the Recruits' evidence negating voluntariness. This Court must hold that the City has failed to prove that the Recruits' production of urine samples was voluntary under all of the circumstances. *See also American Federation of Government Employees v. Weinberger,* 651 F. Supp. 726, 736 (S.D.Ga. 1986); *Bostic v. McClendon,* 650 F. Supp. 245, 249 (N.D.Ga. 1986).

In its attempt to pin the Recruits down to their unqualified deposition answers, the City relies on *Mack v. United States,* 814 F.2d 120, 124 (2d Cir. 1987) where the Second Circuit held that the evidence showed that the plaintiff had unequivocally consented to urinalysis. In *Mack,*

> [t]he waiver form signed by [the employee] provided that:
>
> > I have been advised that I am under no obligation to provide a urine sample in connection with this administrative inquiry and I have further been advised that any information I

> supply would not be used against me in any criminal proceeding. Therefore I voluntarily submit to providing a urine specimen. . . .
>
> At his deposition [the employee] was asked if the government forced him to provide a urine sample. He replied:
>
> > No. I was totally cooperative at that point and happy to provide any information they wanted.

Id. When the employee answered a summary judgment motion with an affidavit indicating that he submitted to the test because of fear of losing his job and coercion, the court held that this affidavit contradicted his deposition testimony and should be disregarded, and that summary judgment should be granted against him on his fourth amendment claim because of consent. *Id.* at 124-25.

It is the rule in the Sixth Circuit, as well, that "[a] party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts her earlier deposition testimony." *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453, 460 (6th Cir. 1986) (citing *Biechele v. Cedar Point, Inc.*, 747 F.2d 209, 215 (6th Cir. 1984)). Affidavits that explain deposition testimony, however, do not necessarily contradict that testimony. *See Bender v. Southland Corp.*, 749 F.2d 1205, 1211 (6th Cir. 1984) (accepting affidavits explaining previous deposition testimony after a motion of summary judgment had been made). In this case, the Recruits' affidavits qualify and explain their depositions, rather than contradict them. Moreover, the evidence of consent is entirely distinguishable from that in Mack. The quality of the Recruits' responses were unlike Mack's expository answer to his deposition question, and the Recruits neither signed a waiver form

nor were advised that they were not required to give a urine sample. Because Mack is inapposite to this case, this Court must find for the Recruits on the issue of consent.

C. Liability of the City

Having determined that the Recruits did suffer a violation of their fourth amendment rights, the Court must next determine the appropriate measure of damages under 42 U.S.C. §1983. This is an issue that was not fully briefed by the parties. It has been clearly established that recovery of damages under 42 U.S.C. §1983 is limited to compensation for actual injuries suffered. Actual injuries include financial loss and emotional and psychological harm. *See Memphis Community School District v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978); *Stewart v. Furton*, 774 F.2d 706, 710 (6th Cir. 1985) (damages from constitutional torts lie for harm to intangible, dignitary interests). Although the Recruits suffered no financial loss through having to undergo the unconstitutional urinalysis search, their deposition testimony indicates that some of them suffered tortious assaults to their dignity. The Court does not doubt that the City's unsettling invasion of the Recruits' privacy is a tort for which the law normally provides damages.

In researching the issue of damages, however, the Court finds an issue not addressed by either party. That is the issue of whether in this case the City can be held liable under §1983. The Supreme Court has held that

> a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or

> by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.

Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 694 (1978). Whether the Recruits can collect damages from the City, therefore, depends on whether the City acted pursuant to official policy.

Obviously, actions taken by a municipality's legislative body constitute official policies. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Likewise, "official policy exists when there are actions by municipal agencies or boards that exercise authority delegated by the municipal body." E. Chemerinsky, *Federal Jurisdiction* 392 (1989) (citing *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978)). Finally, it is also true that "actions by those with final authority for making a decision in the municipality constitute official policy for purposes of §1983." *Id.* at 393 (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986)).

There is no evidence that the City's legislative body authorized the drug testing of the police cadets in question, nor that the municipal body delegated such authority to a municipal agency or board. It is possible, however, that official policy was created when a City employee, with final authority on the matter, decided to conduct the drug tests. In explaining when an individual governmental employee's action creates official governmental policy, the Supreme Court noted that

> a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly

> made by that government's authorized decisionmakers, it surely represents an act of official governmental "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is taken only once or to be taken repeatedly.

Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (footnotes omitted). Thus, merely because the City had only conducted the drug test once, for the first time, and without written procedures to follow, does not mean that the drug test was not "official policy." Rather, the illegal search of the Recruits, undertaken as a part of the drug test, was official policy if the decision to conduct the drug test as it was conducted was made by a properly authorized official. On this subject, the Supreme Court continued:

> Municipal liability attaches only where the decisionmaker possesses final authority with respect to the action ordered. . . . Authority to make municipal policy may be granted directly by a legislative enactment or be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. . . . We hold that municipal authority attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing a final policy with respect to the subject matter in question.

Id. at 481-84 (footnotes omitted). Whether liability will attach to the City, then, depends finally on whether Ohio law granted final policymaking authority to the individuals who chose the particular course of action taken during the drug test. According to the deposition

testimony of two of the individual defendants, Chief of Police Hanton and Safety Director Turner, the decision to test the Recruits for drug use through urinalysis was made by Chief Hanton. The means of collecting the urine samples and the laboratory used to analyze those samples were chosen by Chief Hanton and several officers who reported to him. Safety Director Turner was not made aware that the urine test would be undertaken until after it had been completed, and therefore took no part in determining the details of how the test would be conducted. If any individual can be identified as the one who chose the particular course of action taken during the drug testing, it is Chief Hanton. Thus, only if Chief Hanton had final policymaking authority pursuant to state law, or was properly delegated that authority by the entity who first held it under state law, can the City be found liable for damages under *Pembaur. See Bey v. Saginaw County,* 649 F. Supp. 62, 64 (E.D.Mich. 1986).

Several provisions of City law discuss the roles of the Director of Public Safety and the Chief of Police, and their relationship to each other. The City Charter first affirms that the Chief of Police is subordinate to a department director:

> The Chief of Police shall have exclusive control of the stationing and transfer of patrolmen and other officers and employees constituting the Police Force, under such rules and regulations as may be established by the Mayor or by the director of the department to whom the said Chief of Police may be immediately responsible.

Cleveland, Ohio, Charter §116 (1951). A municipal ordinance then makes clear to which department director the Chief of Police is responsible:

> There is established a Division of Police in the Department of Public Safety, to be administered and controlled by a Chief of Police, subject to the provisions of the Charter and ordinances of the City, *and to the direction of the Director of Public Safety.* . . . All members of the Division shall be appointed by the Director of Public Safety, unless otherwise provided in the Charter.

Cleveland, Ohio, Code §135.09(a) (1988) (emphasis added). As for the Director of Public Safety, City ordinances note that "the Director shall be the executive head of the police and fire forces of the City under the direction of the Mayor and he shall be the appointing authority thereof." *Id.* at §135.01 (1942).

Under City law, then, the decisions of Police Chief Hanton were always subject to review by Safety Director Turner. Hanton had broad authority to deploy his forces as he saw fit, but Safety Director Turner had exclusive authority to decide who would be appointed to the police force in the first place. As "appointing authority" over the division of police, Safety Director Turner had complete control over the hiring, firing, and discipline of all police officers. Turner may have left to Hanton's discretion certain decisions concerning police force personnel, but that is not tantamount to delegation to Hanton of final policymaking authority. *See Pembaur v. City of Cincinnati,* 475 U.S. 469, 483 n.12 (1986) (distinguishing delegation of authority from giving another the power to use discretion).

It was Turner who signed the termination letters to the Recruits because it was Turner, not Hanton, who had the authority to discharge police cadets and officers. *See* Cleveland, Ohio, Code §135.36 (1977) (every police officer shall submit to biannual medical examinations and "[t]he Director of Public Safety shall take appropriate action in

cases of physical or mental disability or impairment, as is within his authority and according to lawful duty."). Hanton merely recommended to Turner that the Recruits be discharged, based on the positive drug test results. Turner could have decided that the drug test results were meaningless, appointed the Recruits to the police force, and ordered that the police department waste no more money on drug testing. Conversely, Turner could have decided that the test results were invaluable, terminated the Recruits immediately, and ordered that future cadets be tested for drugs once each week. In any event, it is clear that it was Turner who had final authority to decide whether drug tests should or should not be conducted. Police Chief Hanton did not have final policymaking authority, because any decision he made to terminate a Recruit based on drug test results would have been appealable to Turner. *See Etheridge v. City of Brentwood, Tenn.*, 887 F.2d 1086 (6th Cir. 1989) (unpublished opinion) (1989 U.S. App. LEXIS 15843) (holding that police chief lacked final authority on personnel matters because his decisions were appealable to city manager).

The issue of damages, and the related issue of whether the City can be held liable for those damages, did not receive the full adversarial briefing so necessary to our system of justice. Nonetheless, in examining the details of this case, the Court finds that the individual who had final policymaking authority was not the individual who chose the particular course of action taken during the drug tests. Accordingly, the actions that Chief Hanton and other individual defendants took during the drug test cannot be attributed to an official policy of the City. *See Tarantino v. State of North Carolina*, 639 F. Supp. 661, 670-71 (W.D.N.C. 1986), *rev'd*

on other grounds, 825 F.2d 772 (4th Cir. 1987), *cert. denied*, 489 U.S. 1010 (1989) (holding that a municipality could not be held liable absent official policy). Therefore, the Court holds that the Recruits cannot collect damages from the City for the invasion of privacy they suffered during the unconstitutional search.

In summary, the Court finds that the drug testing as actually conducted by the City, and by the individual defendants, violated the Recruits' right to be free from unconstitutional search and seizure, and that the Recruits did not consent to being searched. The Court further finds that the individual defendants are not liable for damages because they enjoy qualified immunity, and the City is not liable for damages because it was not acting pursuant to official policy.

V. FOURTEENTH AMENDMENT ANALYSIS

The fourteenth amendment to the United States Constitution provides that local governments shall not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The Recruits claim that the City and the individual defendants twice denied the Recruits due process: first, the Recruits were denied substantive due process when the defendants failed to employ accurate chemical testing of the Recruits' urine samples; and second, the Recruits were denied procedural due process when the defendants failed to provide a hearing before terminating the Recruits. The Recruits also claim that the City and the individual defendants denied the Recruits equal protection of the law because the Recruits were treated differently from other city employees who were similarly situated.

In reference to these claims, the Recruits insist that the defendants should not be permitted to advance in their defense any evidence that the Recruits ingested illegal drugs. The Recruits point out that this evidence was obtained through an unconstitutional search, and argue that the evidence must therefore be disregarded by the Court pursuant to the exclusionary rule set out in *Mapp v. Ohio,* 367 U.S. 643 (1961), and its progeny. If the Court accepts this argument, any consideration by the defendants of the results of the Recruits' drug tests, and therefore any decision by the defendants to discipline the Recruits based on positive test results, would be improper.

The court, however, does not agree that the evidence of the Recruits' positive drug test results must now be excluded from consideration because the urinalysis, as conducted, was unconstitutional. As directed by the Sixth Circuit, this Court has granted summary judgment to the individual defendants with respect to the Recruits' fourth amendment claims because the drug testing met the objective reasonableness standard required for qualified immunity. *Feliciano v. City of Cleveland,* No. 86-3436, slip op. at 3 (6th Cir. April 10, 1987) ("defendants could not reasonably have known that such conduct was so violative as to deprive them of immunity"). The same objective reasonableness standard also determines whether the "good faith exception" to the exclusionary rule should be applied. *Malley v. Briggs,* 475 U.S. 335, 344-45 (1986) (citing *United States v. Leon,* 486 U.S. 897, 923 (1984)). Consistency therefore demands that the good faith exception to the exclusionary rule be applied in this case. Evidence of the Recruits' drug test results is properly considered as the Court addresses the Recruits' fourteenth amendment claims.

A. Due Process Claims

There are two separate guarantees encompassed in the fourteenth amendment's prohibition against governmental actions that "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. These guarantees are commonly referred to as the right to procedural substantive process and the right to procedural due process. "The categories of substance and procedure are distinct." *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985).

The right to substantive due process serves to restrict "certain arbitrary, wrongful actions 'regardless of the fairness of the procedures used to employ them.' " *Zinermon v. Burch*, 110 S. Ct. 975, 983 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). It is a guarantee that governmental actions will be found unconstitutional unless they are reasonably related to a legitimate end of government. *Exxon Corp. v. Governor of Maryland*, 98 S. Ct. 2207, 2213 (1978). The right to procedural due process guarantees that fair procedures will be provided by the government before divesting an individual of a fundamental right. Thus, any "deprivation of life, liberty, or property [must] 'be preceded by notice and [an] opportunity for hearing appropriate to the nature of the case.' " *Loudermill*, 470 U.S. at 542 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

The Recruits maintain that their rights to both substantive and procedural due process were violated. They claim that the defendants denied them substantive due process by conducting a urine test which produced results so arbitrary and unreliable as to be unconstitutional. Next, the Recruits claim they were denied procedural due process because the defendants,

prior to terminating the Recruits, provided the Recruits with neither adequate notice nor an adequate hearing. For the reasons set out below, the Court grants summary judgment to the defendants on both of these claims.

1. Substantive Due Process

In bringing their substantive due process claim, the Recruits focus on the scientific procedures surrounding the urinalysis. This is in contrast to the Recruits' fourth amendment claim, where the Recruits rightly contend that the sum of procedures put in place to circumscribe official discretion and to protect their privacy during urine collection was grossly inadequate. The Recruits claim here only that the analytical technique employed to detect the presence of drug metabolites in their urine samples produced arbitrary and capricious results, resulting in deprivation of a substantive aspect of their liberty.[3]

In various briefs submitted to the Court, the Recruits go into great detail concerning the reliability of the chemical tests used by Smith Kline, the laboratory that the defendants hired to conduct the urinalysis. The Recruits also present a complete overview of existing federal agency regulations, case law, and treatises on the topic of drug urinalysis, all of which make clear that the tests used by Smith Kline in this case are now regarded

[3] The Recruits' briefs can also be construed to raise a claim that the analytical technique employed to detect the presence of drug metabolites in their urine samples violated their right to *procedural* due process. Simply, the Court does not find the procedures used by the defendants to be constitutionally inadequate. *See* discussion of the highly accurate GC/MS test, which was used in this case, *infra; cf. Burka v. Newark City Transit Authority*, 739 F. Supp. 814, 836-38 (S.D.N.Y. 1990).

either as suspect or incomplete. The Court agrees with the Recruits that the urinalysis conducted in this case was technically deficient.

The test for whether a substantive due process claim is valid, however, is not whether a governmental procedure suffers from some technical deficiency. The test in this case is whether the urinalysis as conducted bears a reasonable relation to the City's legitimate purpose of ridding itself of police cadets who abuse illegal drugs.[4] Only if the drug test procedures are "irrational," *Exxon Corp. v. Governor of Maryland*, 98 S. Ct. 2207, 2213 (1978), or produce results that " 'offend those canons of decency and fairness which express notions of justice of English-speaking peoples,' " *Rochin v. California*, 342 U.S. 165, 169 (1952) (quoting *Malinski v. People of State of New York*, 324 U.S. 401, 416-17 (1945)), do the Recruits succeed on their substantive due process claim. "Only when a law is a totally arbitrary deprivation of liberty will it violate the substantive due process guarantee." *Woods v. Holy Cross Hospital*, 591 F.2d 1164, 1176 (5th Cir. 1979) (quoting an earlier version of 2 J. Nowak, R. Rotunda & J. Young, *Treatise on Constitutional Law*, 59 (1986)).

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[4] The Supreme Court has outlined a two-tiered approach to examination of substantive due process claims. One standard requires only that state law bear "a rational relationship to permissible state objectives." *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977). "Regulations imposing a burden on [fundamental rights, however,] may be justified only be compelling state interests, and must be narrowly drawn to express only those interests." *Carey v. Population Services Int'l*, 431 U.S. 678, 686 (1977). Because the Recruits do not point to any fundamental right to privacy infringed upon by the City's drug test, the City need only meet the first of these standards.

Clearly, the procedure used by Smith Kline to analyze the Recruits' urine samples was far from totally arbitrary; rather, it appears to have been totally accurate. Based on an EMIT test and a RIA test, Smith Kline reported to the defendants that the Recruits had ingested illegal drugs. Given these test results alone, the defendants moved to discharge the Recruits. As noted, the Court recognizes that the combined results of the EMIT and RIA tests are now regarded as an insufficiently accurate indicator of drug use. But Smith Kline later conducted a GC/MS test on the Recruits' urine, apparently for internal quality control checking purposes. The GC/MS test, which the Recruits admit is highly accurate, completely confirmed Smith Kline's earlier analysis.

While today's scientific protocol may demand use of the GC/MS test as a confirmatory procedure before drug test results are announced, the defendants' not having done so does not rise to the level of denial of substantive due process. The chemical urinalysis conducted by the defendants did not produce capricious results and did not by itself lead to unfair treatment of the Recruits. Rather, the urinalysis was rational, accurate, and fair. Therefore, the defendants' motion for summary judgment on the claim that the defendants violated the Recruits substantive due process rights is granted, and the Recruits' converse motion is denied.

2. Procedural Due Process

The Recruits' right to procedural due process is a guarantee that certain procedures will be followed before their life, liberty, or property is taken from them. The Recruits claim that defendants deprived them of both liberty interests and property interests without following constitutionally adequate procedures.

a. Liberty Interests

The Recruits complain that the defendants deprived them of their liberty by publicly and falsely impugning the Recruits' moral characters. "When a state fires an employee for stated reasons likely to make him unemployable in the future, by marking him as one who lost his job because of dishonesty or other job-related moral turpitude, the consequences are so nearly those of formally excluding him from his occupation that the law treats the state's action the same way, and insists that due process be provided." *Lawson v. Sheriff of Tippecanoe County, Ind.*, 725 F.2d 1136, 1139 (1984); *see also Bishop v. Wood*, 426 U.S. 341 (1976) (liberty interest exists in being free from stigmatization by governmental disciplinary action). Specifically, due process requires the state to give an employee notice and an opportunity to be heard before the termination, so that the employee has an opportunity to refute the charge and to clear his name. *See Codd v. Velger*, 429 U.S. 624, 627-28 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 573-74 (1972); *Wisconsin v. Constantineau*, 408 U.S. 433, 437 (1971).

There are several elements necessary to an employee's claim that the state has deprived him of his liberty to pursue the career of his choice. First, there must be a dispute between the employer and the employee concerning the truth of the employer's statements. *Codd v. Velger*, 429 U.S. 624 (1977). Second, "there is no deprivation of liberty if the employee is not fired." *Lawson v. Sheriff of Tippecanoe County, Ind.*, 725 F.2d 1136, 1139 (1984) (citing *Paul v. Davis*, 424 U.S. 693, 710 (1976)). Third, there must be some defamatory statement made by a state official in connection with the termination. *Paul v. Davis*, 424 U.S. 693, 710 (1976). And fourth, the employee must have been given either no

opportunity to refute the charge and clear his name, or an inadequate opportunity. *Board of Regents v. Roth*, 408 U.S. 564, 573 n.12 (1972).

As to at least some of the Recruits, there is a dispute as to whether they actually smoked marijuana.[5] Most of the Recruits claim that any marijuana detected in their urine was the result of "passive inhalation," or inhaling stray marijuana smoke that was generated only by others. But the Recruits have not shown the Court that they were fired, nor that a defamatory statement was made by a government official, nor that they were afforded inadequate hearings to clear their names.

After the drug test results were announced, the Recruits were given a clear choice by the defendants: they could either resign, or they could be terminated. The Recruits were urged not to suffer termination but to resign instead, since resignation "is a much-used, face saving device designed to avoid the stigma of being fired." *Giglio v. Dunn*, 732 F.2d 1133 (2d Cir. 1984), *cert. denied*, 469 U.S. 932 (1984). The Recruits agreed to sign resignation forms. Now, however, the Recruits state that they resigned involuntarily because they were under duress when they were given their choice to resign or be terminated. As one court explains,

> a resignation is involuntary and therefore ineffective when it is the product of the appointing authority's wrongful coercion. Thus, where an employer induces the resignation as the only alternative to a removal based upon unfounded charges of misconduct, the resignation should be regarded as ineffective to deny the employee his appeal. Under these circumstances, there has not been a resignation but, rather, a

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[5] Feliciano, however, admitted to using marijuana while a police cadet. Feliciano dep. at 27.

> removal, the merits of which the employee should be permitted to contest. This differs from a situation where an employee is permitted to resign as an alternative to being removed on charges which are meritorious; in such an event, as there is no coercion, the resignation is voluntary.

Kinney v. Dept. of Admin. Services, 469 N.E.2d 1007, 1010 (Ohio Ct. App. 1984). Here, the charges against the Recruits were meritorious—the highly accurate GC/MS test, although performed after the Recruits were asked to resign, confirmed that the Recruits ingested marijuana at levels above that which passive inhalation allows. Furthermore, when the Recruits were given a choice between accepting termination letters or signing resignation forms, the defendants explained that the Recruits could fight the defendants' decision by challenging their termination, or instead accept the defendants' decision and simply resign. The Court finds, from reading the transcripts of the Recruits' interviews, that this choice was presented clearly. Furthermore, the Court notes that at the Recruits' request, the Civil Service Commission held a hearing to determine the voluntariness of the Recruits' resignations. At this hearing, the Recruits were given an opportunity to respond to evidence and call and cross-examine witnesses. The Commission found that the Recruits' resignations were voluntary. Absent special circumstances[6] not present in this case, this Court finds

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[6] "Special circumstances" might be, for example, that the decisionmakers at the administrative hearing were not impartial. The Recruits appear to raise this claim when they state that "the Commission is a part of the City of Cleveland, who is a Defendant in this case. . . . [T]here is little question that the hearing was a sham." Plaintiffs' brief dated Aug. 20, 1986, at 5. Simply because the Civil Service Commission is a "part of" the City, however, does not mean that the Commission has "the kind of personal or financial stake in

(Footnote continued on following page.)

it appropriate to rely on the Commission's finding. *See University of Tennessee v. Elliot*, 478 U.S. 788, 799 (1986).

Nor does the Court credit the Recruits' contention that the defendants actually published a defamatory statement concerning the Recruits. First, the GC/MS test results apparently indicate that any statement made by the defendants that the Recruits abused illegal drugs was true. Second, although the defendants released word to the press that some cadets had tested positive for drugs and would not graduate, the defendants did not mention any of the Recruits' names. Individual Recruits were not named in any news reports until Rojas spoke to the press to assert his innocence; even then, other Recruits who asked not to be identified were kept anonymous. The defendants apparently tried to avoid naming names. Feliciano's name, for example, was not published in the press until he filed this lawsuit. The Court does not believe, therefore, that the defendants published a defamatory statement about any of the Recruits.[7]

(Footnote continued from preceding page.)

the decision that might create a conflict of interest, and there is nothing in the record to support charges of personal animosity." *Hortonville Joint School District No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482, 492 (1976). The Court does not believe that the preclusive effect of the Commission's finding can be ignored by virtue of any special circumstances.

[7] The Court also notes that probationary employees are less likely to be stigmatized than are permanent employees. *See Burka v. New York Transit Authority*, 739 F. Supp. 814, 835 (S.D.N.Y. 1990) (holding that, given Transit Authority policy, "marijuana test results only foreclosed the future job opportunities of permanent employees [, not probationary employees,] and only that subclass had a liberty interest in reputation at stake").

Finally, the Court notes that the Recruits were given a chance to respond to the defendants' contentions before being asked to resign, and were later given a Civil Service Commission hearing where they were permitted to challenge the test results. Due process requires only that pretermination hearings "be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 545-46 (1985). Before they were asked to resign, the Recruits were notified of their urinalysis results and were given an opportunity to respond. Those who provided reasonable explanations (for example, drug prescriptions validly authorized by medical doctors) were allowed to continue as employees. The Court believes this pretermination hearing was constitutionally adequate. Post-termination hearings generally call for full administrative or judicial review. As mentioned earlier, a full administrative hearing was afforded to the Recruits by the Civil Service Commission. The Commission found that the Recruits "voluntarily signed written resignations instead of accepting their termination letters," that the defendants neither "promised or threatened anything to the [Recruits] in order to get them to resign," and that the urinalysis tests provided "a valid basis for determining illegal drug use." This Court finds that the post-termination hearing provided by the Civil Service Commission was constitutionally adequate.

In summary, the Recruits fail to prove elements necessary to their claim that the defendants denied them procedural due process. The Court finds that the defendants did not unconstitutionally deprive the

Recruits of their liberty interests, and accordingly the Court grants defendants' motion for summary judgment. The Recruits' converse motion for summary judgment is denied.

b. Property Interests

In regard to the defendants' alleged unconstitutional deprivation of the Recruits' property interests, the Recruits direct the Court's attention to *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985). *Loudermill* reaffirms the proposition that public employees who can be discharged only for cause have a constitutionally protected property interest in continued employment. *Loudermill* further holds that due process requirements are met if: 1) prior to the discharge of such an employee, he is given some kind of minimal opportunity to respond to the stated reasons for termination; and 2) after the termination, the employee is given a fair and adequate hearing. *Loudermill*, 470 U.S. at 542-47. The Recruits complain that they were deprived of procedural due process because they were discharged from employment but were given neither an adequate pretermination hearing nor a fair post-termination hearing.

The defendants respond by claiming first that *Loudermill* has no application to this case. *Loudermill* specifically "consider[ed] what pretermination process must be accorded a public employee who can be discharged only for cause." *Id.* at 535. Defendants distinguish *Loudermill* by insisting that: 1) the Recruits had no constitutionally protected property interest in continued employment because the Recruits were on probationary status, so that the "for cause" standard does not apply; and 2) the Recruits were not discharged; they voluntarily resigned. The defendants also insist that

even if the instant case cannot be distinguished from *Loudermill*, pretermination and post-termination hearings were given to the Recruits sufficient to meet due process requirements.

As previously discussed, the Court agrees with the defendants that the Recruits voluntarily resigned, and also believes that the pretermination and post-termination hearings given to the Recruits were constitutionally adequate. However, the Court need examine only the defendants' threshold contention that because the Recruits were on probationary status, they had no constitutionally protected property interest in continued employment. If the defendants are correct, the Recruits' procedural due process claim fails because their "federal constitutional claim depends on their having had a property right in continued employment."[8] *Id.* at 538 (footnote and citations omitted). To determine whether the Recruits had a valid property interest in continued employment, the Court must examine state law: "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' " *Id.* (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

When the parties originally briefed this case to the Court, *Loudermill* was new law. Because at that time Ohio courts had not decided the question of whether probationary employees had a property interest in continued employment, the Recruits and the defendants each constructed excellent and thorough arguments on this point. Since that time, however, Ohio courts have clearly held that the rights of probationary employees are more limited than those of regular employers:

[8] Of course, the due process clause also protects interests of life and liberty. The Recruits' contention that they were unconstitutionally deprived of liberty, however, has already been discussed *supra*.

> In *Loudermill*, . . . the United States Supreme Court held that R.C. 124.34 creates a property interest in continued employment for classified civil servants. The court stated that a deprivation of such a constitutionally protected right may be accomplished only pursuant to constitutionally adequate procedures. Thus, an individual *must* be given an opportunity for a hearing *before* being deprived of any significant property interest. . . .
>
> The [*Loudermill*] court further added:
>
> > "The *tenured* public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." . . .
>
> Clearly, the instant matter does not present a similar situation. [Plaintiff], as a probationary employee, did not have a legitimate claim of entitlement to continued employment since his appointment was not final until satisfactory completion of the probationary period. . . . Therefore, a probationary employee is not entitled to a hearing before reduction or removal since such an employee does not have a constitutionally protected property interest which would require the safeguards of procedural due process. [Plaintiff's] reliance on *Loudermill* . . . in order to require a due process hearing prior to his reduction, is not well-taken.

Taylor v. City of Middletown, 568 N.E.2d 745, 749 (Ohio App. 1989) (emphasis in original) (citations omitted). Although *Taylor* refers to a promotional appointee, Ohio courts have held similarly for original appointees:[9] "a

[9] A promotional appointee is an employee who has been promoted but whose promotion is not absolute until successful completion of a probationary period. Failure of the employee to complete this probationary period results in a "reduction," or demotion back to pre-promotion status. An original appointee, on the other hand, is an employee who has been provisionally hired. If the probationary period is not successfully completed, an original appointee is "removed," meaning employment is discontinued entirely. *See generally Taylor v. City of Middletown*, 568 N.E.2d 745 (Ohio Ct. App. 1989). The Recruits are original appointees.

probationary employee [does] not possess a property interest in continued employment so as to come within the protection of the Fourteenth Amendment of the United States Constitution." *Jacomin v. City of Cleveland*, No. 59250, 1990 Ohio App. LEXIS 4521, at *9-10 (Ohio Ct. App. Oct. 18, 1990).

The Recruits admit that they were probationary employees. Ohio courts have held that probationary employees have no constitutionally protected property interest in continued employment. For this reason, the Court grants defendants' motion for summary judgment on the Recruits' claim that the defendants violated the Recruits procedural due process rights. The Recruits' opposing motion for summary judgment is denied.

B. Equal Protection Claims

The equal protection clause of the fourteenth amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Governmental action that employs a classification calling for disparate treatment of similarly situated persons must be examined for constitutional deficiency. Depending on the type of governmental action at issue, however, an equal protection claim is subject to one of two distinct tests.[10] If "the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," then "equal protection analysis requires strict scrutiny." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (footnotes omitted). On the other hand, if the governmental action

[10] A third test, used to review the constitutionality of quasi-suspect classifications such as gender, is not pertinent to this case.

employs a classification that does not reach a fundamental right or a suspect class, the action "is presumed to be valid and will be sustained if the classification drawn ... is rationally related to a legitimate state interest." *City of Cleburne, Texas,* 473 U.S. at 440.

In their pleadings, the Recruits identify six separate classifications that the defendants allegedly employed to unconstitutionally treat the Recruits differently from other City employees. The Recruits allege that the defendants: (1) ordered urine testing of the police cadets, but not of two firefighters who were undergoing training in the police academy at the same time; (2) ordered urine testing of the police cadets, but not of fully appointed police officers; (3) constructively discharged the Recruits, but only suspended two police cadets who had committed disciplinary infractions not involving illegal drug use; (4) allowed other cadets to provide additional explanation for their positive drug test results, but did not allow the Recruits to do so; (5) allowed police officers with drug abuse problems to avoid disciplinary action by seeking help from an "employee assistance unit," but did not give the Recruits the same opportunity; and (6) conducted the urine testing in such a way that the results were racially discriminatory.

The last of these six classifications must pass the strict scrutiny test, since ancestral, racial, and alienage-based classifications are "constitutionally suspect and subject to the most rigid scrutiny." *McLaughlin v. State of Florida,* 379 U.S. 184, 192 (1964) (citations and quotations omitted); *see Massachusetts Bd. of Retirement,* 427 U.S. at 312 n.4. In their sixth claim, the Recruits essentially allege that melanin, which is found in higher concentrations in the skin of individuals with

african and hispanic ancestry, causes urine tests to falsely register the presence of drugs. However, the Recruits' sixth claim has already been adversely ruled upon in *Shield Club v. City of Cleveland*, 647 F. Supp. 274 (N.D. Ohio 1986). The plaintiff class in *Shield Club*, which included the Recruits, "failed to prove their claim that the mandatory urine tests have had an adverse discriminatory impact upon minority cadets." *Id.* at 287. *Shield Club* clearly makes *res judicata* the Recruits' equal protection claim based on racial discrimination. The Recruits apparently recognize the *res judicata* effect of *Shield Club*, since they did not pursue their racial discrimination equal protection claim in later briefs to this Court.

The other five classifications outlined by the Recruits do not make distinctions that touch members of a suspect class, so they need merely meet the rational basis standard to pass constitutional muster. Under the rational basis test, governmental action is not unconstitutional unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [governmental] actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Applying this test, the Court finds that none of the remaining five classifications allegedly used by the defendants violates the Recruits' right to equal protection.

First, the Recruits claim that testing the urine of only the police cadets, but not of two firefighters who were undergoing training in the police academy at the same time, had no rational basis. The Recruits note that the drug tests were purportedly done to ensure the fitness of any City employee who carried firearms, and

that upon graduation both the cadets and the firefighters would be allowed to carry firearms. The Recruits claim that testing only the cadets for drug use is therefore irrational. However, Chief of Police Hanton had been informed that the police cadets, not the firefighters, were abusing drugs. Furthermore, Hanton's objective was to avoid "put[ting] recruits on the streets with hand weapons who were using illegal substances." While Hanton had nearly complete discretion concerning the hiring and deployment of police cadets, Hanton had no control over the hiring and deployment of firefighters. Whether the firefighters were allowed on the streets with hand weapons was entirely up to the Fire Chief. Thus, it was certainly not irrational for Hanton to test only his own cadets. It might have been wise for Hanton to also test the firefighters, and perhaps to inform the Fire Chief of his findings. But wisdom is not the test for an equal protection claim; the test is merely rationality. Hanton's decision to test the police cadets but not the firefighters was rational, so the Recruits' claim must be dismissed.

The Recruits next maintain that there was no rational basis behind ordering urine testing of the police cadets, but not of police officers. As noted before, however, Chief of Police Hanton had been informed specifically that his police cadets, not his police officers, were abusing illegal drugs. It is not irrational to test only those about whom suspicions have been explicitly raised. Furthermore, the Recruits were in the unique position of being days away from graduation and receiving firearms for the first time. As such, the Recruits were especially appropriate subjects of a test the object of which was to *prevent the appointment* of weapons-carrying police officers who abused drugs. That

Hanton did not test police officers who had already been appointed does not make his actions irrational, nor does it deny the Recruits equal protection of the law.

The City clearly had a rational basis for differentiating between police cadets who had used illegal drugs and police cadets who had committed disciplinary infractions not involving illegal drug use. Giving a weapon to a police cadet who abuses drugs is quite different from giving a weapon to police cadet who had failed to appear for academy training for three days. It seems quite rational to this Court to seek the resignation of the first cadet while merely suspending the second. Moreover, the disciplinary infractions of these two cadets are so different in nature that the two cadets cannot even be said to be similarly situated. Dissimilar treatment, therefore, was not unconstitutional.

The Recruits also claim that the defendants allowed some cadets to provide additional explanation for their positive drug test results, but did not allow the Recruits to do so. In making this claim, however, the Recruits ignore vital facts. All those cadets whose drug test results were positive were asked if they could explain why their urinalysis had revealed the presence of drug use. Several cadets claimed that the only drugs their urinalyses could have detected were validly prescribed. These cadets were given an opportunity to provide "additional explanation" by being allowed to produce copies of their drug prescriptions. Subsequent testing confirmed that the prescribed drugs had in fact caused the positive test results for these cadets. In contrast, the Recruits were not offered a chance to provide "additional explanation" of their positive test results simply because they had provided no reason for the defendants to do

so.[11] None of the Recruits claimed to be using prescription drugs, even when asked. It is clearly rational for the defendants to treat differently cadets who claimed they had passively inhaled marijuana from cadets who claimed they had used prescription drugs. This claim must also be dismissed.

Finally, the Recruits argue that there was no rational basis for allowing police officers with drug abuse problems to avoid disciplinary action by seeking help from the "employee assistance unit," and not allowing police cadets with drug abuse problems the same opportunity. This argument is unavailing. The employee assistance unit was established to "assist police officers with problems that are affecting their daily lives and which are beginning to manifest themselves in declining job performance." General Police Order 24-49 at 1. The police department correctly recognizes that police officers are "in one of the most demanding professions imaginable," and that police work "creates *Stress* of an [sic] unique nature." *Id.* It seems quite reasonable that the police department would desire to make the assistance of a special unit available only to veteran officers who have experienced this "unique stress" during the course of duty, but not to cadets, whose experience had been limited to the classroom. The resources of the employee assistance unit are doubtless limited; conserving those resources for officers who have actually suffered through anxious circumstances on the streets of Cleveland is not irrational.

[11] Some of the Recruits claimed that their positive test results occurred through passive marijuana smoke inhalation and insist that they should have gotten an equal chance to explain their test results. Given that the test was designed not to register passive marijuana smoke inhalation, however, defendants' decision to allow "additional explanation" only from those cadets who claimed prescription drug use was rational.

In summary, the Court finds that any classifications allegedly used by the defendants to treat the Recruits differently did not violate the Recruits' constitutional rights to equal protection. The drug testing as performed by the City and the individual defendants was a rational means to serve the legitimate goal of denying final appointment to police cadets who had used illegal drugs. Therefore, the Court grants the defendants motion for summary judgment on the Recruit's equal protection claims, and the Recruits' opposing motion for summary judgment is denied.

VI. CONCLUSION

This Court was presented with motions for summary judgment on all claims by both the Recruits and the defendants. The Court finds that the Recruits' right to be secure from unconstitutional search and seizure was denied, but further finds that neither the individual defendants nor the City can be held liable for damages. The Court also finds that the Recruits' rights to due process and equal protection were not denied. Accordingly, the Court denies summary judgment to the Recruits on all claims, grants summary judgment to the individual defendants on the Recruits' fourth amendment claim based on the individual defendants' qualified immunity, and grants summary judgment to the defendants on all other counts.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

(Dated July 15, 1986)

Nos. C72-1088, C77-346

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE SHIELD CLUB, *ET AL.*,
Plaintiffs,

v.

CITY OF CLEVELAND, *ET AL.*,
Defendants.

MEMORANDUM AND ORDER

WILLIAM K. THOMAS, *Senior District Judge.*

Forty-three cadets in the 95th Police Academy class were required to submit urine specimens on October 21, 1985. SmithKline Bio-Science Laboratories, Inc. performed EMIT (Enzyme Multiplied Immunoassay Technique) assays on the urine specimens. The assays produced positive results for the presence of marijuana or other controlled substances for 10 out of 20 minorities, and for 3 out of 23 non-minorities. These results were confirmed by an alternate testing method known as radioimmunoassay (RIA) performed on the same specimens. Twelve of the 13 cadets who had tested

positive submitted second urine specimens on October 22, 1985 for gas chromatography/mass spectrometry analysis (GC/MS), which also confirmed the original results.[1]

I.

A.

Thereafter, a hearing was held on January 24, 1986 pursuant to this court's guidelines of January 21. Plaintiffs Shield Club, et al. requested, pursuant to paragraph 7 of the amended consent decree of December 21, 1984, discovery of data relating to the urine testing on October 21, 1985 of the 43 police patrol cadets. Defendant city and intervenor FOP moved for protective orders against plaintiffs' noticed depositions and other discovery requests. In its guidelines, the court ruled that the Shield Club could not engage in unrestricted discovery under the Federal Rules of Civil Procedure in enforcing its rights under paragraph 7. However, the court permitted the plaintiffs to ask leave for discovery

> relating to employment of urine testing of police patrol cadets on or about October 21, 1985, because on the record presented there is a sufficient likelihood that urine testing of police patrol cadets to ascertain any use of controlled drug substances or illegal chemical substances is a "post-examination screening procedure[ ]" within the meaning of paragraph 2(b) of the amended consent decree.

At the January 24 hearing the court directed the city, over its objection, to produce identified laboratory testing materials ("the objective documents") relating to the testing of urine samples of the cadets. These records were produced at the hearings of February 7 and 25 and were inspected by the court and counsel for the

[1] One cadet resigned without submitting a second urine sample.

plaintiffs. At the close of the February 7 hearing counsel for the plaintiffs stated "we would like to have a toxicologist look at the records under the court's supervision so they can discuss them with us." Counsel for the city opposed this request:

> We believe that a showing should be made that the field of toxicology has any bearing on the issue of discrimination on this case before we get to that.

Thereupon, the court formulated this threshold issue:

> We will ask you to make a request for a toxicologist to serve several purposes. You can list them all, and we'll have to decide that threshold question, if it makes any difference whatever [the toxicologist] might tell you about these records as it bears on this question of discrimination. And then, if indeed I find that it might, then I will grant your request [to let the toxicologist look at the SmithKline records].[2]

Simply, the threshold issue may be paraphrased as follows:

> Can a toxicologist's examination and report on the urine testing data collected by the city possibly "bear [ ] on [the] question of discrimination"?

B.

On March 18, 1986 plaintiffs filed their "Brief Re: Drug Testing." They contend that the urine test, administered to police patrol cadets on October 21, 1985, "adversely affected the minority police patrol cadets." Plaintiffs note that "[t]he city retained ninety-one percent of the non-minority cadets, but only forty-four

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[2] In evolving the threshold issue, the court earlier ruled that "once those records [Lt. Groudle and Smith-Kline] are in, plaintiff may make a formal request for the [use] of a toxicologist or for any other relief that I believe is proper and appropriate and submit a supporting brief and let the city respond to it."

percent of the minority cadets after the test." In addition to developing their adverse impact argument and other arguments, plaintiffs advance an argument supported by the attached affidavit of a toxicologist, Dr. James Woodford, and other affidavits and exhibits.

In his ten-page affidavit, Dr. Woodford presents what may be called a melanin theory to show that the assays performed on the urine specimens of the minority cadets could be racially biased. As his first hypothesis he states:

> There can be racial bias in the EMIT, RIA and GC/MS marijuana screening tests for the following reasons: Melanin, the bodily substance responsible for skin tone, occurs in urine as conjugated fragments which closely resemble urinary cannabinoid fragments in terms of physical size, positioning of atoms and bond lengths such that these screening tests may misidentify the melanin fragments as cannabinoids. Some melanin fragments have chemical dimensions and atoms in the right places to fit into the EMIT and RIA antibody slots. Some melanin fragments have the same mass to charge ratio which the GC/MS test can mistake for cannabinoids. GC/MS is tuned to look for cannabinoid fragments. This spectral region has been identified as containing large amounts of melanin derivatives.

The melanin theory underlying plaintiffs' claim was not disclosed to the court and opposing counsel until plaintiffs' filing of March 18, 1986. The city, thereafter, chose to respond with a Motion "Re Further Proceedings in Connection With Plaintiffs' Allegations as to Drug Testing" (hereafter, Motion Re Further Proceedings). The defendant city urges:

> The brief filed by plaintiffs fails to indicate the nature of the relief they seek. Since the minority patrol officer trainees who voluntarily resigned their positions in the aftermath of the testing were replaced by additional minority trainees in the current academy class, it is apparent that no retrospective relief would in any event be appropriate. Moreover, since the city has followed the practice, pursuant to the court's orders of October 29, 1981 and February 24, 1986, of replacing with other minority persons all minority persons who for any reason fail to complete Academy training and become sworn in as police officers, it has yet to be shown why the *class* represented by plaintiffs has any justifiable interest in resolving the issue plaintiffs have raised.

In the guidelines for the January 24 hearing the court declared:

> 3(c). [Under the amended consent decree, the court is not concerned with the impact of any urine testing of particular minority policy patrol cadets for drug or chemical substances, but rather with the city's obligation to comply with requirements of paragraph 4 of the amended consent decree [the hiring preference provision], particularly the introductory language of subsection (a) of paragraph 4.

This court's order of February 24, 1986, applying the order of October 29, 1981 to the amended consent decree, is consistent with this third factor which the court said would "collectively be considered" in "judging whether utilization of the post-examination procedure of urine testing is a non-discriminatory or discriminatory selection criterion." Hence, at the outset of this memorandum and order, the court concludes and determines that it will not consider in this proceeding

any relief that would retrospectively affect or modify the terminations[3] of the ten minority cadets of the 95th academy class who resigned on October 23, 1985.[4]

However, the court overrules the defendant city's objection that the plaintiffs lack standing to press their motion for further discovery. Plaintiffs have standing, under paragraph 7 of the amended consent decree and the concomitant court-imposed procedures, to request discovery from the city if they can support a class-based claim that the city's urine testing discriminates against minority cadets as a class.

Furthermore, it is concluded that the court may treat plaintiffs' motion and affidavit of Dr. Woodford as a class-based request for prospective modification of the present mode of drug testing. This treatment is warranted, since any ultimate finding by the court that there is a scientifically acceptable basis for the melanin theory might well require the court to order the city to modify its use of EMIT, RIA, and GC/MS assays in conducting drug testing. Anticipating that the court may "deal with the issue for prospective purposes (i.e. future drug screening procedures as to police officer applicants and trainees)," the city moves the plaintiffs

> to disclose to the Court and to the City all the empirical bases upon which their claimed expert premises the racial bias theory set forth in his

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[3] As one cadet stated in an affidavit, "Sgt. James told us that it would be better to sign the letter of resignation because if we took the termination, it would be for drug abuse, and that would make it difficult to get a job."

[4] The court expressly rejects plaintiffs' suggestion in their reply brief that "[i]f minority cadets lost their jobs as a result of a violation of the Amended Consent Decree, [the court's] relief could include, on a class basis, reinstatement, back pay and appropriate retroactive beneffits."

Affidavit and his proposal as to the proper means by which drug screening may be conducted that would eliminate the "racial bias" claimed to inhere in the types of testing used in October, 1985.

The various briefs and motions,[5] the affidavits, and the attached exhibits make up the record upon which the court considers the formulated threshold issue and any derivative issues raised by the parties.

II.

Plaintiffs concede that "the City is probably warranted in denying final appointment to any police patrol cadet who is a user of a controlled drug substance or other illegal chemical substance." They contend, however, that because urine testing is a "post-examination screening procedure" that "may have been racially biased" and that "adversely affected" the minority police cadets, the discovery they seek "bears on th[e] question of discrimination." Plaintiffs further maintain that paragrah 2 of the amended consent decree[6] makes the EEOC Uniform Guidelines on Employee Section Procedures applicable to urine testing.

[5] Intervenors FOP and CCPA each filed a brief "Re: Drug testing" after the city filed its "Motion Re Further Proceedings." Thereafter, the plaintiffs filed a reply brief re: drug testing. The city then filed a reply brief in response to plaintiffs' brief re: drug testing and in support of its motion. The city later filed two "supplements" to its reply brief. Thus, the court has been well briefed.

The city did not obtain leave to file its reply brief, *see* Local Civil Rule 3.02, and the city did not obtain leave to file its supplemental briefs or the letters or copies of letters it has filed with the court. However, the court has found each of the pleadings and attachments helpful and retroactively grants leave to the city.

[6] The defendants shall utilize only such selection criteria for the hiring of police patrol officers as are non-discriminatory and demonstrably job related in a manner guided by the EEOC Uniform Guidelines on

(Footnote continued on following page.)

Intervenors FOP and CPPA both challenge the plaintiffs' conclusion that urine testing is a "post-examination screening procedure" and thus a "selective criterion" under paragraph 2 and under the EEOC guidelines. The CPPA argues that the urine testing here, designed to detect voluntary use of illegal drugs, is better characterized as part of a "disciplinary proceeding than . . . [as] a hiring selection criterion." The FOP adds that "the Guidelines clearly do not apply to scientific tests where results are measured by purely objective standards."

In its April 29 reply brief defendant city thus responds to plaintiffs' contentions concerning the applicability of the EEOC Uniform Guidelines to urine testing:

> Plaintiffs' focus upon the EEOC Uniform Guidelines on Employee Selection Procedures is an exercise in irrelevancy. There is no dispute that the City's criterion (non-use of marijuana or other illegal substances) is valid for the hiring or retention of police officers. Regardless of whether or not the EEOC Guidelines contemplate applicability to such testing, it is not disputed that if the melanin theory reflected fact, the testing would be racially discriminatory.

In *Shield Club v. City of Cleveland,* 8 E.P.D. ¶9614 at 5635 (N.D.Ohio July 6, 1974), this court directed the Civil Service Commission to draft

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(Footnote continued from preceding page.)

Employee Selection Procedures. The selection criteria referred to herein include, but are not limited to, the following:

a) entrance examinations; and

b) post-examination screening procedures. The previously approved screening procedures (Court order dated April 22, 1976) may continue to be employed, except insofar as they may conflict with the other provisions of this order.

> a set of written standards that will prohibit and prevent any racially discriminatory practice or procedure in all aspects of the screening of persons (male and female) who have passed the CPD written entrance examination. Not intending to exclude any aspect not herein mentioned, the court directs that the foregoing standards shall apply to the personal history interview, and background investigation of each person, *the medical examination,* and the psychological and/or psychiatric examination (emphasis presently added).

This July 6, 1974 direction to the Civil Service Commission was reaffirmed in this court's order of April 22, 1976. The Commission was further directed on July 6, 1974 to formulate standards that "will prohibit and prevent any racially discriminatory practice or procedure in all aspects of screening" of the persons who had passed the "CPD written entrance examination."

As seen, the above standards were to apply to "the medical examination."[7] The Civil Service Commission Manual of "Medical Standards and Requirements"

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[7] The report of the Civil Service Commission, found to be consistent with the court's order of July 6, 1974, was attached to and made a part of the court's order of April 22, 1976. The only mention of "Medical Examination" is contained in the "OVERVIEW OF SCREENING PROCESS." Nothing contained in said report, see for example section III "Further Grounds for Rejection of Candidates by the Safety Director" and paragraph B, is deemed to have restricted or prevented the Civil Service Commission from its later development and promulgation of its "Medical Standards and Requirements" for police and fire service applicants.

It is determined that the Civil Service Commission's "Medical Standards and Requirements" were developed by the Civil Service Commission pursuant to this court's order of July 6, 1974, which order was reaffirmed by and incorporated in pertinent part in the court's April 22, 1976 order. As seen, paragraph 2 of the amended consent decree (Section 9 of the consent decree) refers to these "previously approved screening procedures (Court order dated April 22, 1976)."

(revised 8-21-78) (hereafter the Manual) requires each eligible applicant to receive "a complete and thorough physical examination." The Manual includes eight categories of examination. The eighth category, entitled "Laboratory," lists as one of three items "Urine for complete urinalysis." Thereafter, a separate chapter meticulously details each of ten separate physical systems. In each chapter "causes of rejection" are specifically itemized by disease or other prescribed physical condition.

The eleventh chapter, entitled "Other Medical Conditions," deals separately with nine different subjects. The first subject, "*Drug Use and Abuse Not Addiction,*" lists four "causes for rejection"; the first cause is presently pertinent:[8]

> (a) Drug abuse characterized by:
>
> (1) The evidence of use of any narcotic drug, amphetamine or hallucinogenic substance *at time of examination* when the use cannot be accounted for as the result of the advice of a recognized health care practitioner (emphasis added).[9]

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[8] The fourth cause permits waivers in "cases indicating use of marijuana (not habitual use)" under certain circumstances and providing, among other things, "there is evidence of *current* drug abstinence" (emphasis added).

[9] The categories of drug use "at the time of examination" that provide "causes for rejection" are broad enough to embrace drug substances that fall within 21 U.S.C. §812 (1982), Schedule I and Schedule II controlled drug substances. For example, Marijuana is a Schedule I drug. "Hallucinogenic substance" is a category that embraces marijuana, even if marijuana were not properly classified as a "narcotic drug." Marijuana "produces a number of physiological and psychological effects." *Nat'l. Org. for Reform of Marijuana Laws (NORML) v. Bell*, 488 F.Supp. 123, 128 (D.D.C.1980) (three judge

(Footnote continued on following page.)

As noted, the Manual provides for compulsory "urinalysis" as part of the medical examination. While this urine testing requirement would embrace wide profile testing for "sugar" and other signs of disease, the compulsory urinalysis requirement is not restrictive. It is determined that its breadth embraces taking urine specimens to test for indication of current drug use.

Evidence in the record demonstrates that urine testing for the presence of marijuana and other controlled substances is carried out by the Safety Department Medical Bureau, identified as the "Medical Department of the Police and Fire Service" in the Manual. Thus, then Chief William T. Hanton described the urine testing, in a letter to police applicants, as "the final phase of your medical examination."

Consistently, the Medical Bureau Medical Director, Godofredo Domingo, M.D. notified a cadet in the 96th academy class that

> following a complete evaluation of your recent medical examination, you are classified (B) Medically Unacceptable for the following reason:
>
> > Positive testing for Cannabinoids (Marijuana) based on supplementary urine sample from October 26, 1985.

(Footnote continued from preceding page.)

court). The 21 U.S.C. §802(17) (1982) definition of "narcotic drug" embraces "cocaine," an extraction from coca leaves, and cocaine is included within Schedule II controlled substances. Although pharmacologically classified as a "non-narcotic central nervous system stimulant" courts hold that it is within the prerogative of Congress to "classify cocaine as a narcotic for penalty and regulatory purposes." *United States v. Whitley*, 734 F.2d 1129, 1141 (6th Cir.1984) and cases cited therein. Amphetamines are drugs that fall within both Schedule II and Schedule III controlled substances. 21 U.S.C. §812.

Dr. Domingo further notified the applicant that this was "in accordance with the medical standards and requirements for police and fire service applicants by the Civil Service Commission of the City of Cleveland." Obviously he was referring to the Manual.[10]

Thus, the Manual documents that "evidence of use of any narcotic drug, amphetamine, or hallucinogenic substance at the time of examination," unaccounted for by medical advice, at least since 8-21-78 has been a "cause[ ] for rejection" of an eligible police or fire applicant. This medical "cause for rejection," one of the medical standards and requirements of the city, thus underpins and particularizes the city's employment policy which denies "final appointment of any police patrol cadet who is a user of a controlled drug substance." Chief Hanton gave one justification for this employment policy in his testimony of December 16, 1985 before the Civil Service Commission. He testified:

> I advised the recruits [on October 23 at the Police Academy] that since the tests had proved positive there was no way we could put recruits on the streets with hand weapons who were using illegal substances.

Based upon the non-delegable responsibility of the city through its police department to maintain public safety and to enforce and uphold state and federal laws and city ordinances prohibiting or criminalizing the possession, sale or distribution of controlled drug substances, and upon the entire record, it is concluded

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[10] Because urinalysis is properly analyzed as a component of the medical examination, it is unnecessary to discuss this court's previous ruling on the use of polygraph examinations. *Shield Club v. City of Cleveland*, 8 E.P.D. ¶9,614 (N.D. Ohio July 6, 1974).

that the city is warranted in denying final appointment of any police patrol cadet who is a user of a controlled drug substance.[11]

As seen, plaintiff now concedes this employment principle.[12] Because this municipal employment policy has a self-evident governmental purpose it is concluded that this policy is "demonstrably job related" and the policy need not otherwise be validated. Furthermore, the particular medical standard under present consideration, that "evidence of use of any narcotic drug, amphetamine or hallucinogenic substance at the time of examination" is a "cause[ ] for rejection," is shown on this record not to be a "racially discriminatory practice or procedure."[13] When body fluids and particularly urine are sampled and subjected to objective testing that is scientifically accepted to show the use or nonuse of marijuana or other controlled substances, such testing is not inherently discriminatory. This assumes, as all counsel seemed to agree at the January 24, 1986 hearing (Tr. 45, line 17 to

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[11] The term "controlled drug substances" as here used is intended to be congruent with the categories specified in Manual of Medical Standards and Requirements for Police and Fire Service applicants, "*Drug Use and Abuse Not Addiction,*" Chapter XI, p. 30.

[12] *See also Davis v. City of Dallas,* 777 F.2d 205, 223-25 (5th Cir.1985), *cert. denied,* ___ U.S. ___, 106 S.Ct. 1972, 90 L.Ed.2d 656 (1986).

[13] Following the use of this quoted language in its order of April 22, 1976, this court held on September 27, 1976 that "[t]he Shield Club's discrimination suit against the Cleveland Police Department is based on its Fourteenth Amendment Equal Protection Clause." Later in the opinion, the court ruled:

> Applying the teachings of *Washington v. Davis* [426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)] it is now manifest that a racially discriminatory purpose or policy in making assignments and transfers must be shown in order to establish the Shield Club's claim that assignments are made within the CPD in a discriminatory manner.

Tr. 46, line 9), that "chemical testing" operates in the same manner on the body fluids of minorities as it does on the body fluids of non-minorities. If that assumption is true no EEOC validation would be required. If the assumption is not true and the melanin theory "reflect[s] fact," urine testing would be, as the city concedes, "racially discriminatory."

III.

As seen, paragraph 2 of the amended consent decree of December 21, 1984 (paragraph 9 of the original consent decree of November 11, 1977) states in its first sentence:

> The defendant shall utilize only such selection criteria for the hiring of police officers as are non-discriminatory and demonstrably job related in a manner guided by the EEOC Guidelines on Employment Section Procedures.

While this sentence places "and" between "non-discriminatory" and "demonstrably job related," the word "and" will be construed as "or" to foster the purposes of the Consent Decree. Thus, two alternate standards were provided. The permissible selection criteria must be: (1) non-discriminatory or (2) demonstrably job related in a manner guided by the EEOC Guidelines on Employment Selection Procedures.

As for the provision that selection criteria must be "non-discriminatory," the past history of the case dictates that to violate the standard a racially discriminatory purpose or policy must be manifested.[14]

[14] Reasonably construed, this "racially discriminatory purpose" requirement of the 1976 decision, *supra* note 13, was adopted a year later as the first selection criteria, i.e. "non-discriminatory purpose"

(Footnote continued on following page.)

However, it is not likely that Shield Club has this meaning of "non-discriminatory" in mind when it urges in its first brief that

> Dr. Woodford's comments warrant careful scrutiny of the drug tests by the court and the parties to determine if the city is complying with the requirement of ¶12 of the Amended Consent Decree which requires non-discriminatory selection criteria for the hiring of police patrol officers.

Shield Club's reliance on Dr. Woodford's melanin theory to support its contention that the "Emit and RIA screening tests ... may have been racially biased" appears rather to be based on a disparate impact claim. Previously in its first brief, under the heading of "ADVERSE IMPACT AND DEFENDANTS' RESPONSIBILITIES UNDER CONSENT DECREE," Shield Club states:

> A selection procedure is considered discriminatory under the Uniform Guidelines where it has an adverse impact on the employment opportunities of members of any race, sex or ethnic group [29 CFR §1607.3(A)].

Of course, the guidelines' "Purpose" includes the statement that "[t]hese guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results." 29 C.F.R. §1607.1(B).

(Footnote continued from preceding page.)

in paragraph 9 of the 1977 consent decree. The alternate selection criteria standard is that the selection criteria be "job related in a manner guided by the EEOC Guidelines on Employment Selection Procedures." To challenge a selection criteria under this alternate standard a statistical showing of disparate impact as threshold or prima facie proof of racial discrimination is required. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584, 99 S.Ct. 1355, 1365, 59 L.Ed.2d 587 (1979).

Moreover, "Use of a selection procedure is in compliance with these guidelines . . . if such use does not result in adverse impact on any race. . . ." 29 C.F.R. §1607.16(C). Hence the court will examine the adverse impact contentions of the plaintiffs. The court proceeds with this examination although it previously has determined that for the reasons given neither the City's policy disqualifying from employment users of marijuana or other drug controlled substances nor the use of urine specimens requires validation to show that either the policy or the assays are job related.

Pointing to the results of the October 21, 1985 test and calculating the application of the "four-fifths rule" in the EEOC Uniform Guidelines, plaintiffs conclude that

> [t]he defendants' drug screening test has clearly had an adverse impact upon the minority cadets . . . and clearly creates an inference of discrimination under the Uniform Guidelines.

In response to plaintiffs' disparate impact argument, the city represents that in the interim SmithKline has performed assays in November 1985 on urine samples of 90 persons whose names appeared on the then current civil service police eligible list and on urine samples of 45 (of the 90) who comprised the 96th Police Academy class and who were tested on May 12, 1986. The city states that as to the group of 90 persons tested in November 1985, 4 of 42 minority persons and 3 of 48 non-minority persons tested positive for marijuana use. The city has also reported to the court that

> [o]n May 12, 1986, each of the 45 members of the current Police Academy class, which persons were appointed on February 24, 1986, consisting of 23 minority persons and 22 non-minority persons, submitted urine samples which were sent to

SmithKline Bio-Science Laboratories for drug testing. *Each and every member of the class tested negative for marijuana.*

The city has provided no further information to the court with respect to the two drug abuse screenings performed subsequent to the first, 95th academy class testing.

Assuming the same or similar testing procedures were used in the November 1985 and May 12, 1986 tests, the aggregate results may be considered. *See Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1257 & n. 2 (6th Cir.1981); *See also Fudge v. Providence Fire Department*, 766 F.2d 650, 656-57 (1st Cir.1985) (the court held that "lumping" of test statistics is permissible only if "testing episodes" are "sufficiently similar"). So combined, the aggregate statistics vitiate plaintiffs' claims of adverse impact.

Plaintiffs' only reply to the city's statements concerning the additional urinalysis performed on the subsequent academy classes has been to point out that "[n]either the plaintiffs, the Court, the FOP nor the CPPA has had access to the results and underlying data . . ." Apart from Dr. Woodford's theories examined in Part IV, but assuming the city's representations are accurate, plaintiffs cannot use the disparate impact of the city's drug screening program as a springboard and justification for further discovery of "the results and underlying data" under the amended consent decree. *Accord, New York v. Beazer, supra; General Electric Co. v. Gilbert*, 429 U.S. 125, 137 n. 14, 97 S.Ct. 401, 409 n. 14, 50 L.Ed.2d 343 (1976) (*Griggs* burden of showing job-relatedness arises only after discriminatory effect has been shown); 29 C.F.R. §1607.1(B). Discussion of the

production of the results of the October 26 and May 12 testings is deferred until Part V. In the intervening part the court takes up Dr. Woodford's melanin theory.

IV.

As seen, plaintiffs principally rely on the melanin theory of Dr. James Woodford on how race bias can occur in standard marijuana screening tests. Dr. Woodford's first hypothesis regarding melanin fragments is set out above, *supra* at p. 277 [A121]. As a second hypothesis, Dr. Woodford asserts that whole melanin distributed through the body and blood stream "tends to hold and congregate drugs" and thereby "change the marijuana clearance and detection time for individuals."

Plaintiffs take the position that "Dr. Woodford's comments warrant careful scrutiny of the drug tests by the court" to determine compliance with paragraph 2 of the amended consent decree. As seen the city's principal response to Dr. Woodford's affidavit is a request that plaintiffs supply "empirical bases" for the melanin theory. In addition, the city represents that it "stands ready to seriously consider [the empirical bases], and in the event [the melanin theory's] validity is apparent, to alter its testing procedures accordingly." In turn, plaintiffs condition their accession to this request for evidence on the city's agreement to allow the plaintiffs' original discovery requests.

A court scrutinizes experts' affidavits when "unsupported assumptions" and "theoretical speculations" are not backed up with "specific facts" or "grounds reasonably relied upon by experts in a particular field forming opinions or inferences upon the subject." *United States v. Various Slot Machines on Guam*, 658 F.2d 697, 700 (9th Cir.1981) (quoting *Merit*

Motors, Inc. v. Chrysler Corp., 569 F.2d 666, 672-3 (D.C. Cir.1977)); *see Bieghler v. Kleppe*, 633 F.2d 531, 534 (9th Cir.1980). More to the point, "opinion testimony that would not be admissible if testified to at trial may not properly be set forth in an affidavit." J.W. Moore & J.C. Wicker, 6 Moore's Federal Practice ¶56.22[1] at 56-1315 and -1316. The admissibility of opinion testimony with respect to a scientific principle or discovery is usually determined by the application of the "general acceptance" principle enunciated in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923). The Sixth Circuit has defined "general acceptance" under *Frye* as "synonymous with reliability. If a scientific process is reliable, or sufficiently accurate, courts may also deem it 'generally accepted.' " *United States v. Distler*, 671 F.2d 954, 961 (6th Cir.1981) (quoting *United States v. Franks*, 511 F.2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 693 (1975)).

The inquiry whether methods or theories are generally accepted as reliable in the field can involve determining if they have received "a significant degree of national and international recognition," *Distler, supra* 671 F.2d at 961-62; if published or unpublished scientific literature exists relating to the subject matter, *see United States v. Stifel*, 433 F.2d 431, 440-41 (6th Cir.1970), *cert. denied*, 401 U.S. 994, 91 S.Ct. 1232, 28 L.Ed.2d 531 (1971); and if an expert's tests have been duplicated or if authority exists in the field for novel theories, *see United States v. Brown*, 557 F.2d 541, 557 (6th Cir.1977).

These standards assist the court in determining how to proceed upon plaintiffs' discovery request and defendant city's counter-request for a showing of the "empirical bases" for Dr. Woodford's conclusions. Dr.

Woodford's affidavit outlines two hypotheses supporting his statement that dark skin tone "could" affect the outcome of an EMIT, RIA or GC/MS marijuana screening test. Dr. Woodford does not refer at any point in his affidavit to any reported or unreported laboratory or scientific experiment conducted, by himself or by any other scientist or technician, to support or verify his two hypotheses. He does refer, however, to general data and specific situations in which black persons tested positively for marijuana use at a higher rate than for white persons. He makes the statement "[m]y studies indicate that positive results for blacks in EMIT, RIA, and GC/MS tests can be the result of melanin interference," affidavit ¶6 at 6, but he does not discuss or further elucidate the "studies" mentioned. He refers to one case in which he was "able to demonstrate through laboratory testing an absolute correlation between marijuana positive and melanin positive results." *Id.* This cryptic statement alludes to a "laboratory testing" but does not on its face indicate that the correlation observed between the two values "marijuana positive" and "melanin positive" can be attributed to the interference theory which he has postulated.

Defendant city presents several sources disputing the validity of Dr. Woodford's melanin interference hypothesis. Most significantly, defendants refer the court to the results of a study published in the Journal of Analytical Toxicology, July/August 1985 issue. Published in the form of a detailed letter to the editor, Dr. M.A. Elsohly, et al., from the University of Mississippi Research Institute of Pharmaceutical Sciences and Department of Pharmaceutics, developed and conducted a study to ascertain whether individuals with high serotonin levels or blacks with high melanin

levels would interfere with either the screening or confirmation of the urinary metabolite signaling the presence of marijuana use. Dr. Elsohly, et al. concluded that

> the concern that certain indole carboxylic acids, particularly in melanin and serotonin metabolites, might interfere in the screening and/or confirmation of the THC-COOH (marijuana metabolite) in urine is totally unjustified.

The defendants also observe that Dr. Woodford's conclusions are inconsistent with the results of the November 1985 and May 12, 1986 testings performed by the city.

The court has before it, then, Dr. Woodford's affidavit outlining his hypotheses, the city's representations on the race-neutral results in the November 1985 and May 12, 1986 testings, and the materials submitted by the city which in varying degrees contradict the conclusions of Dr. Woodford (these include the published Elsohly study and the materials identified in the margin).[15]

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[15] The court finds it remarkable that the EMIT test, for example, in use in this country now for more than 10 years (*see* Testimony of Dr. Joyce Chang, SVYA, Corporation technical director, Transcript of August 28, 1984 Hearing at 41, in *Higgs v. Wilson*, 616 F.Supp. 226 (W.D.Ky.1985)), has thus far escaped detection of such a serious flaw.

On the contrary, Dr. Joyce Chang testified in *Higgs v. Wilson* that SYVA Corporation has analyzed over 175 substances and has yet to discover a substance that the EMIT test falsely identifies as a cannabinoid. Transcript of August 28, 1984 Hearing at 56, 89. Pursuing Dr. Chang's admission that some false positives could nevertheless occur in EMIT tests, Judge Johnstone pressed the following question:

> So what I'm driving at, I think is what you're saying a false positive is would be the result of operator error or some sort of a procedural error in the handling of the sample or the running

(Footnote continued on following page.)

In this state of the record, there is not a sufficient factual predicate to support Dr. Woodford's melanin interference hypotheses to warrant this court, as the trier of fact, as well as the judge charged with construing and applying the pertinent law, to grant Dr. Woodford access to the SmithKline test data for application of his racial bias theory. However, if he should show sufficient scientific support for his hypotheses this would be enough to presume an adverse impact on the class of minority cadets.

When and if that happens the court may grant plaintiffs' request that Dr. Woodford or some other toxicologist be permitted to review results of the drug screenings. However, until Dr. Woodford's theory is demonstrated to be more than an unsupported assumption or speculation the court declines plaintiffs' request that he see and examine these results.

(Footnote continued from preceding page.)

> of the test and not because of other substances in the donor's system?
>
> Dr. Chang answered:
>
> I say that today. I probably would not have said the five years ago when we first came out because how accurate a test is gets proved with time. As time goes on, I feel greater and greater confidence in the accuracy of the test. Yes, I do say that.

Id. at 111. Although Dr. Chang was not questioned on the misidentification of melanin fragments for cannabinoids, her conclusions are in direct contrast to Dr. Woodford's statement in his affidavit that "[d]ietary interferences and interferences from medication are not well understood in urinalysis and can cause false positive results." Affidavit ¶3 at 3. *See also* I. Sunshine, et al., *Detection and Confirmation of Urinary Cannabinoids*, Journal of Analytical Toxicology 156 (July/August 1985); *but see Storms v. Coughlin*, 600 F.Supp. 1214, 1222 (S.D.N.Y.1984) (occurrence of false positives is a question of fact that survives a motion for summary judgment).

In order to determine whether or not the melanin interference theory is "reliable, or sufficiently accurate," *Distler, supra,* 671 F.2d at 961, the court directs plaintiffs to supplement Dr. Woodford's affidavit with creditable and authoritative data that respond to the following subjects and questions:[16]

1. Dr. Woodford's statements in ¶4 of his affidavit, specifically:

   a. That melanin occurs in urine as conjugated fragments;

   b. That melanin fragments closely resemble urinary cannabinoid fragments in physical size and positioning of atoms and bond lengths;

   c. That some melanin fragments have chemical dimensions and atoms to fit into the EMIT and RIA antibody slots;

   d. That some melanin fragments have the same mass to charge ratio which the GC/MS test can mistake for cannabinoids;

   e. That the GC/MS spectral region has been identified as containing large amounts of melanin derivatives.

[16] None of these subjects are intended to pertain to those portions of Dr. Woodford's affidavit that appear to attack the general accuracy and reliability of the tests, e.g. his challenges to cut off scores, or the four graphs in Court's Exhibit 6 which suggest to Dr. Woodford that GC/SIM rather than GC/MS tests were performed. For cases reviewing the general accuracy of the EMIT cannabinoid assay see, *e.g., Wykoff v. Resig,* 613 F.Supp. 1504, 1508-12 (N.D.Ind.1985) (collecting cases); *Peranzo v. Coughlin,* 608 F.Supp. 1504, 1512-15 (S.D.N.Y.1985); *Jensen v. Lick,* 589 F.Supp. 35 (D.N.D.1984); *Cf. Pella v. Adams,* 638 F.Supp. 94 (D.Nev.1986); *Jones v. McKenzie,* 628 F.Supp. 1500, 1505-07 (D.D.C.1986); *Storms v. Coughlin, supra,* 600 F.Supp. at 1221-22.

The court does not regard it relevant to its scope of inquiry in this matter to deal with alleged errors of judgment or calculation by SmithKline in the conduct of the tests. The impact of such errors, if any, would appear not to bear on the plaintiffs' class-based claim of racial prejudice. Rather, the impact would be individual in nature.

2. Dr. Woodford's statements in ¶5 of his affidavit, specifically:

a. That whole melanin tends to hold and congregate drugs;

b. That high melanin content can change the marijuana clearance and detection time for an individual.

3. Records of armed forces labs, referred to by Dr. Woodford in ¶6 at page 6 of his affidavit, that made changes in their testing procedures based on his recommendations.

4. Some proof of the "studies," referred to in ¶6 at page 6 of the affidavit, that indicate that positive results for blacks in EMIT, RIA and GC/MS tests can be the result of melanin interference.

5. Provide some data of the "laboratory testing" for melanin interference performed by Dr. Woodford, referred to in ¶6 at page 6 of the affidavit, that allowed him to demonstrate an absolute correlation between marijuana positive and melanin positive results.

6. Dr. Woodford's statements in ¶6 at page 7 of his affidavit, specifically

a. That he demonstrated at the hearing how he could identify black officers by the signal area of their fragment on accumulation;

b. That the additional signal area accounted for higher quantitative results for black personnel.

7. Identification of the case involving "Atlanta City Policemen and Firemen" referred to in ¶6 at page 6-7 of the affidavit.

8. With respect to Dr. Woodford's statements in ¶6 at page 7-8 of his affidavit regarding the "discrepancy between the levels detected by the screening tests and those found in confirming tests":

a. Identify the "other researchers" who have "noted" this discrepancy, and the conclusions they reached.

b. Identification of the study referred to on page 7 that compared specimens using different tests and reported that levels detected on EMIT and RIA do not correlate well with values obtained by GC/MS.

c. Some data that show that only a fraction of the total melanin interferences may filter through to the GC/MS detector.

d. Some data that refute the several sources referred to by defendants concluding that GC/MS test values theoretically *should* be lower than the EMIT and RIA values because GC/MS identifies only one THC metabolite.

9. Data that support the statement in ¶8 of the affidavit that the GC/SIM test is "less specific and less thorough than GC/MS," and that the GC/SIM test can have more racial bias.

10. Data that support the statement in ¶9 at page 9 that the results of cadets who showed above 20 ng/ml may be due to a combination of melanin interference and unintentional exposure.

11. More generally, has the melanin theory or any aspect of the melanin theory been tested with a scientifically acceptable experiment(s)? If so, provide data showing the design and conclusions of the experiment.

12. Data that show that the melanin theory has been published in any form or exposed in some manner for scrutiny by the scientific community.

13. Any data that scientifically challenge Dr. Elsohly's et al. experimental result disproving the melanin theory.

14. Ten of 20 minority cadets in the October 21, 1985 testing tested negative; 38 of 42 minority cadets in the November 1985 testing tested negative; and all of the 23 minority cadets in the May 12, 1986 testing tested negative. Data that supports why, if the melanin interference theory is valid, the above minority cadets and indeed *all* individuals with dark skin tone did not test positive on EMIT, RIA and GC/MS tests?

V.

At a court meeting to be scheduled, the city is directed to produce for examination by the court, plaintiffs' counsel, and counsel for each intervenor all the documents that will reflect and verify the results of all urine testings conducted by the city with respect to police academy cadets subsequent to the October 21, 1985 testing.

At the same meeting plaintiff is directed to produce for examination by court and counsel all of the Dr. Woodford materials/submissions specified at pp. 285-86 [A140-43].

Apart from Dr. Woodford's theories discussed in Part IV, should the documentation of the EMIT and other assays reflect the results reported by the city for the testing of the 96th academy class, plaintiffs' claim of adverse discriminatory impact will fail. There will remain only the patent adverse impact of the EMIT, RIA and GC/MS tests, should the plaintiffs be able to sufficiently support the scientific acceptability or reliability of Dr. Woodford's melanin theory discrediting these assays. Upon examination of the documents to be exchanged and after oral argument, the court, consistent with the foregoing Memorandum and Order, will determine the future course of Shield Club's paragraph 7 discovery requests.

SUPPLEMENTAL MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

(Dated November 5, 1986)

Nos. C72-1088, C77-346

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE SHIELD CLUB, *ET AL.*,
Plaintiffs,

v.

CITY OF CLEVELAND, *ET AL.*,
Defendants.

SUPPLEMENTAL MEMORANDUM AND ORDER

In accordance with the court's memorandum and order of July 15, 1986, and the court's findings and conclusions at the in-court hearing of October 17, 1986, the court enters the following findings:

1) based upon the in-court representations of plaintiffs' counsel the court finds that plaintiffs have not produced and have given no indication that they can produce the required documents and data to comply wth the 14 questions in the court's July 15, 1986 memorandum and order regarding Dr. Woodford's melanin theory;

2) based upon the court's review of the records produced in court on October 17, 1986 by defendant City of Cleveland pursuant to part V of the court's

July 15, 1986 memorandum and order, the court finds that none of the 45 cadets of the 96th Police Academy class (23 minorities and 22 non-minorities) tested positively for the drugs assayed. Accordingly, the court determines that the plaintiffs have failed to prove their claim that the mandatory urine tests have had an adverse discriminatory impact upon minority police cadets.

Therefore, plaintiffs' request, under paragraph 7 of the amended consent decree of December 21, 1984, for additional discovery of data relating to the urine testing of police patrol cadets is denied.

IT IS SO ORDERED.

ORDER

Pursuant to Fed.R.Civ.P. 54(b), the court finds, as stated at the hearing of October 17, 1986, that there is no just cause for delaying entry of judgment denying plaintiffs' request for production of documents under paragraph 7 of the amended consent decree, as well as on the court's rulings in its July 15, 1986 memorandum and order.

Therefore, pursuant to Rule 54(b), it is ordered that the rulings made in the court's July 15, 1986 memorandum and order, the findings and conclusions made at the hearing of October 17, 1986, and the findings and conclusions made in the court's memorandum and order of November 5, 1986, constitute, and are here entered, as a final judgment.

Notwithstanding, the court retains continuing jurisdiction over this action for the express and limited purpose of enforcing the provisions of the amended consent decree of December 21, 1984.

IT IS SO ORDERED.

STATE OF VIRGINIA
CITY OF CHARLOTTESVILLE

AFFIDAVIT OF DANIEL A. SPYKER

My name is Daniel A. Spyker and I have been asked by counsel to comment on the question of whether the drug testing and summary dismissal of Raul Feliciano, Jr., Richard J. Rojas, Valeria Greathouse, Robert S. Beavers, Richard Zappala, and Darryl T. Hood (hereinafter Feliciano, et al), from the Cleveland Police Academy had reasonably established culpability with regard to the then current policies and technologies of urine drug testing.

1. QUALIFICATIONS

I earned my PhD degree from the University of Minnesota in Electrical Engineering in 1969, and my MD degree from the University of Virginia in 1974. I completed a three year Internal Medicine residency/clinical scholar program at the University of Virginia in 1977. I then entered the Division of Clinical Pharmacology in the Department of Internal Medicine at the University of Virginia as an Assistant Professor. Since that time I have been the primary faculty person responsible for poisonings and drug overdoses (Clinical Toxicology) and management of patients with difficult drug dosing problems (Clinical Pharmacokinetics). I have done the majority of the teaching in these areas in the Medical School since 1978, and have been responsible for one or more post-doctoral fellows and medical students doing electives in the area of Clinical Pharmacology. I have been the primary director and manager (Co-Director) of the Blue Ridge Poison Center which serves the more than two million consumers and physicians in Regions 1 and 3 of western Virginia.

I have been the primary faculty person responsible for medical student training education in drug abuse and drug testing. I have written several papers in this and related areas (See Attached CV). I work closely with the department of Clinical Pathology (daily meetings and weekly interdisciplinary conferences) in setting up the Drug Abuse Urine (DAU) testing in our medical center. I am one of approximately 110 physicians worldwide board certified in this subspecialty of Medical Toxicology.

My personal research interests have included quantitation of drugs during intoxication (pharmacokinetics) and the changes over time of the effects of intoxication (pharmacodynamics). I have qualified as an expert witness in Virginia courts and the Federal District Courts in the area of medical toxicology.

I serve as consultant to the City of Charlottesville and to the city Police Department in setting up their policies and procedures regarding drug testing. I am the primary physician toxicologist serving the General Electric plan in Charlottesville and consult in numerous individual cases on a daily basis. I have been the invited lecturer on drug abuse and drug testing to the International Personnel Management Association, the Virginia Association of Housing and Community Development Officials, and the International City Management Association.

2. *BASIS FOR OPINIONS*

I have reviewed materials relevant to this case (C85-3356) including the deposition of Karen Rash, supervisor of toxicology at Smith-Kline Bio-Sciences, August 28, 1986, the supporting documents and procedures; and transcripts of interviews with Mr. Raul Feliciano and Mr. Richard J. Rojas. In addition I have reviewed numerous

articles and reports including, but not necessarily limited to, those listed on attachment B, as well as drawn upon my entire professional experience and consultation with colleagues. References given in [ ] refer to document numbered in attachment B.

3. OPINION

Several individual elements of this case require comment including the employer policies and procedures, chain of custody, the testing technology, and performance impairment.

Employer Policies and Procedures

In helping an employer to design a drug testing program, or in evaluating an existing program, we consider the following items:

1. Determine your need for a drug and/or alcohol abuse reduction program through surveys, review of personnel records, or "blind" drug or alcohol testing of your employees.
2. Get further information as required including: National Clearinghouse for Drug Abuse Information, P.O. Box 416, Kensington, Maryland, 20795.
3. Determine what you will do when you identify abusing employees through your alcohol or drug screening.
4. Identify referral resources and develop referral policies and procedures.
5. Get expert assistance to develop testing procedures and identify reliable laboratories.

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6. Develop a company policy through cooperation with union, labor relations, legal, medical, and employee assistance staff.

Of the above, the one I stress the most with each employer is the importance of communication. In particular, each employee must be aware of the policies and aware of the strategies to deal with positive test results. Although I have no knowledge of how many of these items were considered, the treatment of the officers suggests a considerable lack in several of these categories.

In consulting with employers, I always explain to the employers that a cost effective, legally sound program must include administrative toxicological and legal support. It must address the need for drug and alcohol screening 1) at employment application, 2) for cause, as well as 3) random testing. The program must deal with **policies and procedures for confirmatory testing** when the screen is positive to protect both the employee and the employer from false accusations.

Pre-employment Drug Screening

The testing of all applicants as a condition of the employment seems to be the least controversial and most accepted drug and alcohol testing strategy. Most large employers require a history and physical exam as a part of employment which typically has involved a urinalysis for sugar and protein. Thus, including a drug screen on the urine and perhaps an alcohol breath test represents little change in operating policy from the prospective employees view point.

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Testing for Cause

The testing of an individual involved in a damage or personal injury accident seems likewise widely practiced and well accepted. Even directors in the American Civil Liberties Union have endorsed the "Two Eye" test. They support the use of drug testing when an employee appears to operate in a compromised fashion. Supervisor training is essential to avoid "witch hunts".

Both established company policy and documentation should support the reason for drug testing. Typically these would include: 1) Work related injury, 2) increased absence (Monday-Friday syndrome), 3) decrease in productivity, morale, and enthusiasm, 4) repeated tardiness or missing from work station for periods of time, 5) theft of company property (to support the drug habit).

Random Testing

The selection of individuals randomly by management or the testing of an entire work team, department, field crew, or office staff, is by far the most controversial drug testing strategy. Constitutional issues raised include invasion of privacy, unlawful search and seizure, and "innocent until proven guilty" [3].

The third category of information which I feel is essential in setting up any drug testing program is that the employer be aware of the distinction between urine **screening** which is rapid and inexpensive and **confirmation** which is more time consuming, expensive, but essential if any action is to be taken.

So the two heavily stressed points in putting a drug testing program in place are that you must have a **policy in place** and well known to the employees, and you must use specific, expensive **confirmatory testing** before taking any action.

Chain of Custody

From my review of the case related materials, the minimum features of chain of custody appear to be violated. Problems include lack of security, lack of documentation, and uncertainties of packing and shipping.

Testing Technology

In testing for marijuana exposure we seek the active ingredient delta-9-tetrahydracannabinol (THC) or one of its more than one hundred metabolites. The major urinary metabolite, 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid (THC-COOH), is excreted in both the free and conjugated forms. The two tests most widely used in screening are the EMIT (Enzyme Multiplied Immunoassy Technique) and the RIA (Radio Immunoassay). These can be done in minutes, can be done by people with relatively little training, and are relatively inexpensive. The RIA method may be sensitive to as low as 1 ng/ml and the EMIT sensitivity is probably not much less than 20 ng/ml.

The concept of **screen** deserves some comment. One authority points out that the purpose of a screen is "to separate the greater number of negative specimens from those producing positive results" [172]. Both RIA and EMIT are based on an antigen/antibody reaction and where there is an alternative, would not be considered

confirmatory one of the other. This is, of course, the reason Smith-Kline had set up a GC/MS THC-COOH method. Confirmation by this method would be, in my opinion, minimum prior to ever reporting any positive results.

Since available, the GC/MS-SIM (Gas Cromatograph/Mass Spectrometor-Selective Ion Monitoring) was, by a great margin, the best choice of a confirmatory test. Thus, my greatest concern is simply that action was taken without waiting for the confirmatory results of the GC/MS-SIM tests which were done on or about October 29th and reported back to Smith-Kline in Cleveland on October 30th.

The test results, represent the GC Spectra for four selected mass intervals. The internal standard (pyrene butyric acid), comes through only in the first mass interval. A duterated THC would certainly be much more desirable as an internal standard, but was probably not readily available in October of 1985. From the protocol, the calibration data, and the two test results (Rojas and Feliciano) which I had to evaluate, I see no evidence of a zero standard or blank having been run. It would be highly desirable to run a blank or zero THC control at the beginning, end, and immediately after any positive result. This has the primary intent to verify that the entire analysis system is free of THC contamination.

A second concern relates to the "lower limit of quanitation for the assay" of 10 ng/mg. With reporting of the level of 13 ng/ml for Mr. Feliciano, we would need to know the confidence interval for this assay. In particular, is 13 really different from 10 in this particular system.

Performance Impairment

As a researcher in the area of intoxication and performance, I must comment that for THC, no scientific data correlates urine detection with performance impairment. The general term **screen** is particularly apropos when used in the context of THC urine testing. That is to say, detecting THC-COOH in the urine is by no means evidence of impairment. In one study, patients did report a subjective effect produced by a sixteen cigarette indirect exposure [130], but more commonly sidestream smoking does not result in any subjective effect [49, 51, 97].

The very high lipid solubility of THC and its metabolites, result in the gradual and protracted loss of these substances from the body. Thus, urine testing for THC may be positive for as long as 30 days of supervised abstinence. Some employees, such as the Washington DC Metro Authority take action only on a blood test for THC being above a certain threshold.

Although no physician or thoughtful person will endorse the abuse of any psychotrophic agent, there is no conclusive data to support injury to the human organism from low level or occassional exposure to THC. It appears to be effective as an anti-metic agent and as a therapeutic agent in glaucoma (elevated intraocular pressure). Marijuana falls far short of tobacco in terms of a health hazard to our society.

Thus, in the absence of carefully designed and communicated policies and procedures, the absence of a chain of custody, and the uncertainties in the testing technology employed, it is in my opinion that Feliciano, et al, have not been found culpable.

Further Affiant Sayeth Naught.

/s/ D. A. SPYKER
Daniel A. Spyker, PhD, MD

Sworn to and subscribed before me and in my presence, this 14th day of July, 1987.

/s/ SUSAN C. KRAMER
Notary Public
My commission Expires
August 28, 1990's

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DANIEL ADRIAN SPYKER

Curriculum Vitae

Personal Data:

Birthdate:	November 15, 1942
Birthplace:	San Antonio, Texas
Citizenship:	United States of America
Soc.Sec.No.:	299-36-4741
Married:	Mary Alexandra Saumweber
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Education:

B.E.E. General Motors Institute 1960-1964
M.S. Purdue University 1965-1967
Ph.D. University of Minnesota 1967-1969
Electrical Engineering

M.D. University of Virginia 1971-1974
Board Certified in Internal Medicine 1977
Diplomate—American Board of Medical Toxicology 1980

Professional Experience:

1984-present Associate Professor of Internal Medicine
Division of Clinical Pharmacology
Director, Health Information Center
Associate Professor of Behavioral Medicine and Psychiatry
University of Virginia School of Medicine
Charlottesville, Virginia

1977-1984 Assistant Professor Department of Internal Medicine
University of Virginia School of Medicine
Charlottesville, Virginia

1974-1977 Resident in Medicine/Clinical Scholar
University of Virginia School of Medicine
Charlottesville, Virginia

1969-1971 Principal Research Scientist
Biotechnology and Environmental Factors
Honeywell Systems and Research Center
Minneapolis, Minnesota

Research Interests:

Clinical Toxicology
Management of Acute Poisoning
Intoxication, Ethanol, et al.
Toxicokinetics

Clinical Pharmacokinetics

Characterization of kinetics in the population
Prediction of individual's kinetics
Dosage adjustment from measured levels

Computer Applications

Medical Microcomputer Applications
Toxicology-pharmacokinetics Information System
Automated analysis of physiological data
Information kinetics (Behavior/Education)
Statistical Models and Statistical Analysis
Math and computer modeling of biological processes

Professional Societies:

American Medical Association
American College of Physicians
American Academy of Clinical Toxicology
Fellow 1982
Board of Trustees 1981-84
Chairman, Research Grant Program 1981-Present
American Board of Medical Toxicology
American Association of Poison Control Centers
Chairman, Student Grant Committee 1981-Present
University Association of Emergency Medicine
National Poison Center Network
Patient Information Department 1981
Advisory Board 1982
American Society for Clinical Pharmacology and Therapeutics
Association for the Development of Computer Based Instructional Systems—Health Education Special Interest Group

Honors, et al.:

Phi Eta Sigma, Honorary Scholarship Fraternity, Ohio State
Alpha Tau Omega, Honorary Scholarship Fraternity, GMI
Annual Academic Award, Theta Xi Fraternity, GMI
Bachelor-Master Fellowship, General Motors Corporation,
Upper First Percentile on Graduate Record Exam, GMI
Award for best paper—Hospital Formulary, 1982
Community Service Award, Fredericksburg, Virginia, 1983 Rappahanock EMS Council
Visiting Professor to Veteran's General Hospital, Taiwan, 1984,

License to Practice Medicine:

State of Virginia

Professional Responsibilities:

Editorial Board, *Journal of Toxicology-Clinical Toxicology*
Director, Health Information Center, UVa Medical Center
Co-Director, Blue Ridge Poison Center
Medical Director, *For Kids' Sake*
Co-Director, National Crisis Center for the Deaf
Editorial Board, *Poisindex,* Denver, Colorado
Drug and Pharmacy Committee, University of Virginia Hospital
Chairman, Adverse Drug Reaction Subcommittee
Emergency Medical Services Faculties—State and Federal
Editorial Board, *Drugdex,* Denver, Colorado

Medical Center Computer Committee, UVa Medical Center

Chairman, Computers in Medical School Curriculum Committee

Peer Review of Professional Journals including:

Archives of Internal Medicine
Journal of Toxicology-Clinical Toxicology
American Medical Reports
Journal of Pediatrics
Veterinary and Human Toxicology
Fundamental and Applied Toxicology
Antimicrobial Agents and Chemotherapy
New England Journal of Medicine

Books:

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